v.
Jeffrey Book, et al.

Docketed: August 13, 2002

Court: United States Court of Appeals for the Eleventh Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Aug 6 2002 | Petition for writ of certiorari filed. (Response due September 12, 2002) |
| | Sep 12 2002 | Brief of respondents Jeffrey Book, et al. in opposition filed. |
| | Sep 25 2002 | DISTRIBUTED for Conference of October 11, 2002 |
| | Sep 26 2002 | Reply brief of petitioners Pacificare Health Systems, et al. filed. |
| | Oct 15 2002 | Petition GRANTED.<br>SET FOR ARGUMENT February 24, 2003.<br>********** |
| | Dec 2 2002 | Consent to the filing of amicus briefs in support of either party received from counsel for petitioners United Health Care and United Health Group. |
| | Dec 3 2002 | Consent to the filing of amicus briefs in support of either party received from counsel for petitioners PacifiCare Health Systems and PacifiCare Operations. |
| | Dec 6 2002 | Joint appendix filed. |
| | Dec 6 2002 | Brief of petitioners Pacificare Health Systems Inc., et al. filed. |
| | Dec 6 2002 | Brief amicus curiae of Washington Legal Foundation filed. |
| | Dec 6 2002 | Brief amici curiae of National Association of Manufacturers, et al. filed. |
| | Dec 6 2002 | Brief amicus curiae of Chamber of Commerce of the United States filed. |
| | Jan 3 2003 | Order extending time to file respondents' brief on the merits to and including January 13, 2003. |
| | Jan 10 2003 | Consent to the filing of amicus briefs in support of either party received from counsel for the respondents. |
| | Jan 10 2003 | CIRCULATED. |
| | Jan 13 2003 | Brief amicus curiae of Trial Lawyers for Public Justice filed. |
| | Jan 13 2003 | Brief amicus curiae of National Association of Consumer Advocates filed. |
| | Jan 13 2003 | Brief amicus curiae of Public Citizen, Inc. filed. |
| | Jan 13 2003 | Brief of respondents Jeffrey Book, et al. filed. |
| | Jan 30 2003 | Record filed. |
| | Feb 12 2003 | Record filed. |
| | Feb 12 2003 | Reply brief of petitioners Pacificare Health Systems, et al. filed. |
| | Feb 24 2003 | ARGUED. |

Supreme Court, U.S.
FILED

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No. 02-

IN THE

# Supreme Court of the United States

IN RE HUMANA INC. MANAGED CARE LITIGATION

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
*Petitioners*,

v.

JEFFREY BOOK, D.O., *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

**Whether a district court must compel arbitration of a plaintiff's RICO claims under a valid arbitration agreement even if that agreement does not allow an arbitrator to award punitive damages, leaving to the arbitrator in the first instance the decision of what remedies are available to the RICO plaintiff in arbitration.**

## PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were (a) plaintiffs-appellees Jeffrey Book, D.O., Dennis Breen, M.D., Michael Burgess, M.D., Edward L. Davis, D.O., Glenn L. Kelly, M.D., Manual Porth, M.D., and Charles B. Shane, M.D., and (b) defendants-appellants Foundation Health Systems, Inc., n/k/a Health Net, Inc., PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., n/k/a PacifiCare Health Plan Administrators, Inc., The Prudential Insurance Company of America, UnitedHealth Group Incorporated, f/k/a United HealthCare Corporation, UnitedHealthcare, Inc. and WellPoint Health Networks Inc. This petition is being filed on behalf of PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., UnitedHealth Group Incorporated, and UnitedHealthcare, Inc. No publicly held companies owns 10% or more of PacifiCare Health Systems, Inc. or UnitedHealth Group Incorporated. PacifiCare Operations, Inc., n/k/a PacifiCare Health Plan Administrators, Inc., is owned 100% by PacifiCare Health Systems, Inc., a publicly held company, and UnitedHealthcare, Inc. is owned 100% by United HealthCare Services, Inc., which in turn is owned 100% by UnitedHealth Group Incorporated, a publicly held company.



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## PETITION FOR WRIT OF CERTIORARI

Petitioners PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., UnitedHealthcare, Inc. and UnitedHealth Group Incorporated respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *In re Humana Inc. Managed Care Litigation*.

### CITATION OF COURT OF APPEALS AND DISTRICT COURT OPINIONS

The opinion of the Court of Appeals is reported at 285 F.3d 971. App. 1. The order denying the petition for rehearing and rehearing *en banc* is unreported. App. 55. The first opinion of the District Court for the Southern District of Florida, which the Court of Appeals adopted as its opinion, is reported at 132 F. Supp.2d 989. App. 11. The second opinion of the District Court, which modified its first opinion in part, is reported at 143 F. Supp.2d 1371. App. 47.

### STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction over this petition pursuant to 28 U.S.C. §1254(1) because the petition asks the Court to issue a writ of certiorari to review a case in the United States Court of Appeals for the Eleventh Circuit. The Court of Appeals issued its decision on March 14, 2002 and denied a petition for rehearing or rehearing *en banc* on June 21, 2002. This petition is being filed with the Clerk of this Court within 90 days from the date of the denial of the petition for rehearing.

### FEDERAL STATUTES INVOLVED IN THIS CASE

This petition involves Sections 2 and 4 of the Federal Arbitration Act, 9 U.S.C. §1, *et seq*. ("FAA"), and Section

1964 of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq*. ("RICO"). Those sections are set forth in full in the Appendix. App. 57. Section 2 of the FAA states in relevant part:

> A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 4 of the FAA states in relevant part (with emphasis added):

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. … *The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed in arbitration in accordance with the terms of the agreement.* … If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. … *If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.*



Section 1964(c) of RICO states in relevant part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains ….

## I. STATEMENT OF THE CASE.

On August 14, 2000, plaintiffs Dennis Breen, Jeffrey Book, Manual Porth and Glenn Kelly ("Plaintiffs"), along with several other individuals, filed a ten-count complaint against fifteen defendants, including PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc. (collectively, "PacifiCare"), and UnitedHealthcare, Inc. and UnitedHealth Group Incorporated (collectively, "United"). Several of the counts in the complaint allege that PacifiCare and United violated various provisions of the RICO statute (or aided and abetted violations of that statute). The District Court had jurisdiction over the complaint pursuant to 28 U.S.C. §1331 because Plaintiffs' RICO claims arose under the laws of the United States.[1]

---

[1] Plaintiffs' substantive causes of action were for violations of RICO, *see* 18 U.S.C. §1962(a) & (c), the Employee Retirement Income and Security Act ("ERISA"), *see* 29 U.S.C. §1132(a)(1) & (3), a federal

At all times relevant to the complaint, Drs. Breen and Book were bound by contract to arbitrate disputes with PacifiCare, and hence PacifiCare filed motions to compel Drs. Breen and Book to arbitrate their claims against PacifiCare. Likewise, Drs. Porth and Kelly also were bound by contract to arbitrate their disputes with United, so United filed a similar motion to compel Drs. Porth and Kelly to arbitrate their claims against United.[2]

On December 11, 2000 and April 26, 2001, the District Court ruled on PacifiCare and United's motions to compel. The District Court found that enforceable arbitration agreements existed between PacifiCare and Drs. Breen and Book as well as between United and Drs. Porth and Kelly. *See* 143 F. Supp.2d at 1375; 132 F. Supp.2d at 1000-01 & 1005. The District Court also held that those arbitration agreements required Plaintiffs to arbitrate at least some of their claims against PacifiCare and United. The District Court, however, stopped short of ordering Plaintiffs to arbitrate *all* of their claims against PacifiCare and United. In particular, the District Court held that Plaintiffs did not have to arbitrate their RICO claims because all of the relevant arbitration agreements limited the damages that an arbitrator could award in arbitration: Both PacifiCare agreements

---

Medicare prompt-pay regulation, *see* 42 C.F.R. §417.500(a)(6), and various State prompt-pay statutes, as well as for breach of contract, *quantum meruit*, and unjust enrichment. Plaintiffs also included in their complaint causes of action for conspiring to violate RICO, *see* 18 U.S.C. §1962(d), and for aiding-and-abetting RICO violations (in alleged violation of 18 U.S.C. §2). Plaintiffs amended their complaint while PacifiCare and United's appeal was pending in the Court of Appeals. The amended complaint still includes all Plaintiffs, all defendants (including PacifiCare and United), and most of the causes of action (including all of the RICO causes of action) from the original complaint.

[2] Additional motions to compel arbitration were filed in the District Court, but they are not the subject of this petition.



stated that an "arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by [State] law, except that punitive damages shall not be awarded," United's agreement with Kelly stated that "arbitrators … shall have no authority to award any punitive or exemplary damages," and United's agreement with Porth stated that "arbitrators … shall have no authority to award extracontractual damages of any kind, including punitive or exemplary damages." App. 60-63.

While none of these damages limitations expressly addressed RICO trebled damages, the District Court interpreted the limitations as prohibiting arbitrators from awarding Plaintiffs RICO trebled damages. *See* 132 F. Supp.2d at 1001. Such prohibitions, the District Court held, prevented Plaintiffs from obtaining meaningful relief on their RICO claims in arbitration, and thus Plaintiffs were not required to arbitrate their RICO claims against PacifiCare and United pursuant to the Court of Appeals' earlier decision in *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998).[3] Typical of the District Court's analysis was its discussion of the two arbitration agreements between PacifiCare and Dr. Breen:

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[3] The District Court also refused to compel arbitration of Drs. Porth and Kelly's ERISA and State prompt-pay statutory claims against United even though punitive or multiple damages is not a remedy available for either claim. The District Court did so, at least in part, because the relevant arbitration agreements required that arbitrations be commenced within a year after one party notifies the other in writing of a dispute. App. 62-63. The District Court incorrectly construed this notice requirement as altering the statute of limitations on Drs. Porth and Kelly's ERISA and prompt-pay claims, which the District Court held was impermissible and rendered the ERISA and prompt-pay claims inarbitrable. *See* 132 F. Supp.2d at 1000.

> Both arbitration agreements contain broad language indicating that the parties intended for "any controversy, dispute, or claim arising out of the agreement" to be arbitrated. However, both agreements prohibit the arbitrator from awarding punitive damages. Thus, we are faced with a potential *Paladino* situation, discussed earlier with the context of United's motion to compel arbitration (Section II(A)), where the plaintiff may not be able to obtain meaningful relief for allegations of statutory violations in an arbitration forum. ...
>
> Accordingly, the Court will not compel Dr. Breen to arbitrate his RICO claims against PacifiCare due to the arbitrator's inability to impose punitive (treble) damages. All other statutory and non-statutory claims shall be arbitrated, except for the conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies.

132 F. Supp. 2d at 1005.[4]

PacifiCare and United appealed the District Court's decisions to the Court of Appeals, which had jurisdiction over the appeals pursuant to 9 U.S.C. §16(a)(1).[5] In a

[4] As reflected in the quote in text, the District Court also held that Plaintiffs did not have to arbitrate their conspiracy and aiding-and-abetting claims against PacifiCare and United that "stem from contractual relationships with other managed care companies." 143 F. Supp.2d at 1375; 132 F. Supp.2d at 1007. The Court of Appeals affirmed this holding. *See* 285 F.3d at 974-977.

[5] The District Court denied in part PacifiCare's motion to compel Dr. Breen to arbitrate and United's motion to compel Drs. Porth and Kelly to arbitrate on December 11, 2000. PacifiCare filed its notice of appeal on January 5, 2001 and United filed its notice of appeal on January 9, 2001. Both notices were timely under Federal Rule of Appellate Procedure ("FRAP") 4(a)(1)(A). The District Court denied in part PacifiCare's motion to compel Dr. Book to arbitrate on April 26, 2001, and PacifiCare filed its notice of appeal on May 4, 2001. The notice was timely under FRAP 4(a)(1)(A). The Court of Appeals consolidated these appeals on July 10, 2001.



published opinion, the Court of Appeals affirmed the District Court's holding that Plaintiffs did not have to arbitrate their RICO claims because the relevant arbitration agreements did not allow arbitrators to award punitive damages. *See* 285 F.3d at 973-74. In so doing, the Court of Appeals expressly adopted the reasoning used by the District Court to reach its holding: "We affirm in its entirety the district court's order for the reasons set forth in its comprehensive opinion found at 132 F. Supp.2d 989 (S.D.Fla. 2000)." 285 F.3d at 973-74.

## II. REASONS FOR GRANTING PETITION.

The Court of Appeals' decision, especially when read in conjunction with its earlier decision in *Paladino v. Avnet Computer Technologies*, is crystal clear: A district court in the Eleventh Circuit is authorized to refuse to compel arbitration of any RICO cause of action if the relevant arbitration agreement does not allow an arbitrator to award punitive damages. That decision (a) patently conflicts with the law of the Eighth Circuit, (b) addresses an issue over which there is a deep split among the First, Third, Fifth, Eighth, Ninth and Eleventh Circuits, (c) cannot be reconciled with opinions from the First, Second, Third, Fifth and Eighth Circuits, and (d) undermines the critical role that the FAA plays in promoting alternative dispute resolution. The Court of Appeals' decision also addresses an issue closely related to the issue presented in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, which this Court will decide during the

October 2002 Term. For all of these reasons, the Court should grant this petition.

### A. The Court Of Appeals' Decision Conflicts With The Eighth Circuit's Decision In Larry's United Super, Inc. v. Werries.

The most obvious reason for the Court to grant this petition is that the Court of Appeals' decision is in undeniable and irreconcilable conflict with the decision of the United States Court of Appeals for the Eighth Circuit in *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001). The relevant factual and procedural settings of both appeals are in perfect parallel: As in this case, the *Werries* defendants moved to compel arbitration of the plaintiffs' RICO claims under the FAA because the parties were bound by arbitration agreements. Also as in this case, the District Court held that the plaintiffs did not have to arbitrate their RICO claims because the agreements at issue did not allow arbitrators to award punitive damages. *Compare Werries*, 253 F.3d at 1084-85 *with In re Humana*, 285 F.3d at 973-74 & n.3 *and In re Managed Care*, 132 F. Supp.2d at 1000-01 & 1005.

Based on these operative facts, the *Werries* Court reversed the judgment of the District Court and held that a plaintiff was required to arbitrate RICO claims even if the relevant arbitration agreement did not allow for the recovery of punitive damages – a conclusion that stands in diametric opposition to the Court of Appeals' decision here. More specifically, the *Werries* Court reasoned:

> At this juncture, our jurisdiction extends only to determine whether a valid agreement to arbitrate exists, not to determine whether public policy



> conflicts with the remedies provided in the arbitration clause. There exists a valid agreement to arbitrate the RICO claims in this case, and the Supreme Court in [*Shearson/Am. Express, Inc. v.*] *McMahon*[, 482 U.S. 220 (1987)] has already determined that RICO claims are arbitrable, 482 U.S. at 242, 107 S.Ct. 2332; thus, there exists no "legal constraints external to the parties' agreement foreclos[ing] the arbitration" of this RICO dispute. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Whether a prospective waiver of punitive damages violates the public policy underlying RICO's treble damages provision is a matter for the arbitrators in the first instance when fashioning an appropriate remedy if a RICO claim is proven to the arbitrators' satisfaction, and we express no views on the issue at this time. We are limited to determining whether the matter is arbitrable. We hold that it is.

253 F.3d at 1086.

The Court of Appeals' decision and the *Werries* decision cannot both be correct: Either the FAA requires district courts to compel arbitration of RICO claims under arbitration agreements that prohibit punitive damages (as is the law in the Eighth Circuit under *Werries*) or it does not (as is the law in the Eleventh Circuit under *In re Humana*). This Court should intercede to resolve this otherwise irreconcilable conflict.

**B. The Court Of Appeals' Decision Addresses An Issue Over Which There Is A Split Among The First, Third, Fifth, Eighth, Ninth and Eleventh Circuits.**

The specific and direct conflict between the Court of Appeals' decision and *Werries* reflects a deeper and more general conflict among the Courts of Appeals. A fundamental premise of the Court of Appeals' decision is that it is for a district court to determine, before ordering arbitration, whether a limitation on remedies contained within an arbitration agreement is valid. If the district court determines that it is not, the district court simply refuses to order arbitration, and the matter never reaches an arbitrator. *See* 285 F.3d at 973-74; 132 F. Supp.2d at 1005. This premise is well established in the Eleventh Circuit, *see Paladino*, 134 F.3d at 1062, and is also an accepted premise in the Fifth Circuit, *see Investment Partners v. Glamour Shots Lic., Inc.*, __ F.3d __, 2002 WL 149872, at *2 (5th Cir. July 15, 2002), and the Ninth Circuit, *see Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247-49 (9th Cir. 1995).

On the other side of the divide, as recently recognized by the Seventh Circuit, are at least the First, Third and Eighth Circuits. Those "[t]hree courts of appeals have held that under *Prima Paint* [*Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967),] the arbitrator determines whether contractual limitations on remedies [in arbitration agreements] are valid." *Metro East Center for Conditioning & Health v. Qwest Commun. Int'l, Inc.*, __ F.3d __, 2002 WL 1378752, at *6 (7th Cir. June 27, 2002) (citing *Werries*, 253 F.3d 1083; *MCI Telecomm. Corp. v. Matrix Commun. Corp.*, 135 F.3d 27 (1st Cir. 1998); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3rd Cir. 1997)).



The Eighth Circuit reached this holding (as discussed above) in *Werries*. It recently reaffirmed this holding in *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002).

The First Circuit held that arbitrators, not district courts, initially decide what remedies are available in arbitration in *MCI*. The First Circuit reasoned:

> Equally unavailing is Matrix's new contention that the Agent Agreement's arbitration clause is invalid because the Tariff arbitration rules foreclose remedies, such as multiple damages, to which it is entitled. Putting aside the question of waiver, this argument must be brought to the arbitrator because it does not go to the arbitrability of the claims but only to the nature of the available relief. *See Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-31 (3rd Cir. 1997) [parenthetical omitted]; *PaineWebber Inc. v. Elahi*, 87 F.3d 589, 599 (1st Cir. 1996) [parenthetical omitted]. Matrix's reliance on *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), is misplaced because, unlike the plaintiffs there, Matrix's claims are not brought under a statute specifically designed to protect bargaining rights. The applicable precedent in our circuit is instead that parties may contract to limit remedies in arbitration. *See Raytheon Co. v. Automated Bus. Sys.*, 882 F.2d 6, 12 (1st Cir. 1989); *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-62, 115 S.Ct. 1212, 1217-19, 131 L.Ed.2d 76 (1995) [parenthetical omitted].

*MCI*, 135 F.3d at 33 n.12.

The Third Circuit held that arbitrators, not district courts, initially decide what remedies are available in arbitration in *Great Western*, a case that served as the foundation for both *Werries*, *see* 253 F.3d at 1085-86, and *MCI*, *see* 135 F.3d at 33 n.12. In *Great Western*, the plaintiff argued that her arbitration agreement was invalid because, among other reasons, it "deprive[d her] of ... punitive damages." 110 F.3d at 226. The Third Circuit approached this argument by first setting forth the proper division of authority between district courts and arbitrators:

> Under the FAA the district court must be satisfied that the parties entered into a valid arbitration agreement. In conducting this inquiry the district court decides only whether there was an agreement to arbitrate, and if so, whether the agreement is valid. In so deciding, the district court is not to consider the merits of the claims giving rise to the controversy, but is only to determine, as we have stated, whether there is a valid agreement to arbitrate. Once such an agreement is found, the merits of the controversy are left for disposition to the arbitrator. Moreover, there is a strong presumption in favor of arbitration, and doubts "concerning the scope of arbitrable issues should be resolved in favor of arbitration."

*Id.* at 228 (citations and footnotes omitted).

After laying this groundwork, the Third Circuit rejected the plaintiff's argument that the (alleged) prohibition on



punitive damages in her arbitration agreement allowed her to avoid arbitration:

> The availability of punitive damages is not relevant to the nature of the forum in which [the plaintiff's] complaint will be heard. Thus, the availability of punitive damages cannot enter into a decision to compel arbitration. [The New Jersey Law Against Discrimination] provides that a victim of unlawful discrimination may be awarded punitive damages, but the issue of whether this right has been waived is separate and apart from the issue of whether an employee has agreed to an arbitral forum, and hence, is for the arbitrator to decide.

*Id.* at 232 (citations omitted).

Finally, the Seventh Circuit also appears to be in accord with the First, Third and Eighth Circuits. Like the First Circuit, the Seventh Circuit has held that contracting parties have the right to prohibit the award of punitive damages in arbitration by express agreement. *See Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709-10 (7th Cir. 1994). That Circuit has also recognized that parties generally can waive statutory rights as part of their arbitration agreements absent a federal statutory provision to the contrary. *See Metro East*, 2002 WL 1378752, at *5. These precedents strongly suggest that a district court in the Seventh Circuit cannot refuse to compel arbitration simply because an arbitration agreement prohibits an arbitrator from

awarding punitive damages or otherwise limits the arbitrator's remedial powers.[6]

In sum, there is a clear and mature split among the Circuits over who first decides the meaning and significance of a damages limitation contained in an arbitration agreement: Is it a district court when deciding whether to compel arbitration, or is it an arbitrator during arbitration proceedings (subject, of course, to district court review when the arbitrator's award is being enforced)?[7] The Court should grant this petition and resolve this irretractable Circuit split.

### C. The Court Of Appeals' Decision Cannot Be Reconciled With Opinions From The First, Second, Third, Fifth And Eighth Circuits.

As explained in the preceding section, the Court of Appeals' primary holding – that a district court can deny a

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[6] In *McCaskill v. SCI Mgmt. Corp.*, 285 F.3d 623 (7th Cir. 2002), the Seventh Circuit initially held that a district court could deny arbitration of a Title VII claim if the relevant agreement did not allow an arbitrator to award attorneys' fees, but the Seventh Circuit vacated that opinion days before *Metro East* was published. *See* 294 F.3d 879 (7th Cir. 2002).

[7] On which side of the divide the D.C. Circuit falls is unclear. In *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997), the D.C. Circuit implied, but did not hold, that a district court could refuse to compel arbitration of a Title VII claim if an arbitration agreement limited the Title VII remedies that a plaintiff could obtain. In an earlier case, however, the D.C. Circuit held that a district court cannot refuse to compel arbitration on public policy grounds: "In sum, if parties have validly agreed to submit a dispute to arbitration, we see no reason not to enforce that agreement. If the arbitrator construes the contract so as to require someone to commit an illegal act, a court can then refuse to enforce the arbitrator's decision. A court cannot, however, bypass the arbitration process simply because a public policy issue might arise." *National R.R. Passenger Corp. v. Consolidated Rail Corp.*, 892 F.2d 1066, 1071 (D.C. Cir. 1990).



motion to compel arbitration based on its belief that the remedies available in arbitration are inadequate – cannot be reconciled with published opinions from the First, Third and Eighth Circuits. *See Arkcom Digital*, 289 F.3d at 539; *Werries*, 253 F.3d at 1086; *MCI*, 135 F.3d at 33 n.12; *Great Western*, 110 F.3d at 232. In addition, the Court of Appeals' subsidiary holding – that an arbitration agreement barring punitive damages provides inadequate remedies to a RICO plaintiff – further conflicts with published opinions from the Second and Fifth Circuits.

In *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1356-58 (2nd Cir. 1993), the defendants moved to dismiss securities and RICO claims brought by investor plaintiffs because those plaintiffs had agreed by contract to resolve all claims through arbitration in England. The plaintiffs opposed the dismissal by claiming, among other things, that the arbitration would be inadequate due to the fact that an English arbitrator could not award them RICO trebled damages. The Second Circuit summarily rejected this view:

> That RICO provides treble damages and seeks to deter persistent misconduct does not dissuade us from our view that the [plaintiffs'] contract clauses must be enforced. As we have explained, the [plaintiffs] have adequate potential remedies in England and there are significant disincentives to deter English issuers from unfairly exploiting American investors. Although the remedies and disincentives might be magnified by the application of RICO, we cannot say that application of English law would subvert the policies underlying that statute.

996 F.2d at 1366.[8] Under *Roby*, a plaintiff in the Second Circuit can be required to resolve her disputes in arbitration even if that arbitration does not allow her to recover RICO trebled damages; that same RICO plaintiff in the Eleventh Circuit, however, can escape arbitration under the Court of Appeals' *In re Humana* decision. Such a difference in outcomes is unacceptable.

The Court of Appeals' decision even more directly clashes with the Fifth Circuit's recent *Investment Partners* decision. Similar to Plaintiffs here, the *Investment Partners* plaintiff claimed that it should not have to arbitrate a federal cause of action allowing for trebled damages (in that case, a Clayton Act claim) because its arbitration agreement stated that "arbitrators shall not award punitive damages." 2002 WL 1498721, at *1. The Fifth Circuit agreed with the Court of Appeals that it was for a district court, not an arbitrator, to decide initially whether the remedies available in arbitration were adequate. *See id.* at *2. Thereafter, however, the Fifth Circuit held – in direct conflict with *In re Humana* – that the plaintiff nevertheless had to arbitrate its Clayton Act claims because "the prohibition in the parties' arbitration agreement against awarding 'punitive damages' does not extend to [bar the award of] statutory treble damages" for two reasons:

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[8] *Roby* is consistent with the view this Court expressed of RICO's trebled damages remedy in *McMahon*. There Justice O'Connor reasoned that RICO trebled damages were designed to be an "incentiv[e] for plaintiffs to pursue RICO claims that would advance society's fight against organized crime. But in fact RICO actions are seldom asserted 'against the archetypical, intimidating mobster.' The special incentives necessary to encourage civil enforcement actions against organized crime do not support nonarbitrability of run-of-the-mill civil RICO claims brought against legitimate enterprises." *McMahon*, 482 U.S. at 241-42 (citations omitted).



> First, the task in this case is to construe "punitive" in a private parties' arbitration agreement, which the Supreme Court has clearly said we interpret broadly to permit arbitration as far as possible. Second, it makes sense to draw the distinction, from the standpoint of the parties' expectations when they entered the arbitration agreement, between statutory treble damages and common law punitive damages. That is, punitive damages are awarded under notoriously open-ended legal standards and a broadly defined constitutional limit concerning the amount awarded. Treble damages, however, represent a mere mathematical expansion of the actual damages calculated by the arbitrator. While private parties might well exclude common law punitive damages, with all their uncertainty, from the arbitrator's authority, the riskiness of committing antitrust damages to the arbitrator is much smaller. Thus, antitrust treble damages may indeed be "punitive" simply because they exceed the actual damages that have been inflicted on the victim of violative conduct, but they are not "punitive" for purposes of interpreting the scope of an arbitration clause.

*Id.* at *3.

Following *Investment Partners*, if a plaintiff wants to sue a defendant for violating RICO but has an arbitration agreement with the defendant barring punitive damages, the validity and effect of that agreement changes dramatically as she travels across the country looking for a place to file suit: If she sues the defendant in Little Rock, Arkansas (in the Eighth Circuit), she will be required to arbitrate her RICO claim and the arbitrator will decide whether she can recover

RICO trebled damages; if she sues in Oxford, Mississippi (in the Fifth Circuit), she will again be required to arbitrate her RICO claim, but the arbitrator will have to allow her to recover RICO trebled damages; finally, if she sues in Birmingham, Alabama (in the Eleventh Circuit), she will be able to litigate her RICO claim in court and will be allowed to recover RICO trebled damages in court. *Compare Werries*, 253 F.3d at 1086 (Eighth Circuit) *with Investment Partners*, 2002 WL 1498721, at *2-3 (Fifth Circuit) *with In re Humana*, 285 F.3d at 973-74 & n.3 (Eleventh Circuit) (adopting District Court's opinion). Because such disparities can only promote intolerable forum shopping by plaintiffs, this Court should intercede to remedy this imbalance.

### D. The Court Of Appeals' Decision Undermines The Critical Role That The FAA Plays In Promoting Alternative Dispute Resolution.

Even if there were not a mature split among the Circuits over the question presented by this petition, the Court of Appeals' decision would still merit review by this Court because it is a dangerous precedent antithetical to the effective operation of the FAA for the following reasons:

1. An unspoken, but necessary, assumption underlying the Court of Appeals' decision is that a federal court can decide that certain statutory rights cannot be waived in arbitration even when the legislative body that created the rights did not make them unwaivable. Only by embracing this assumption could the Court of Appeals hold that Plaintiffs were not required to arbitrate their RICO claims despite the facts that (1) Plaintiffs agreed to arbitrate their disputes, including statutory disputes, with PacifiCare and United under arbitration agreements that expressly limited remedies in arbitration, and (2) no provision of RICO



suggests that its rights and remedies are unwaivable.

The Court of Appeals' assumption, however, is incompatible with this Court's precedents broadly recognizing the authority of private parties to waive statutory rights. *See United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties"). As the Seventh Circuit noted in *Metro East*:

> As far as we know, the Supreme Court has never held that *any* entitlement is outside the domain of contract, unless the statute forbids waiver (as §206 of the Communications Act does not). Every day criminal defendants waive the most fundamental rights, such as the right to jury trial and proof beyond a reasonable doubt, in exchange for lower sentences or other benefits. *See United States v. Krilich*, 159 F.3d 1020 (7th Cir. 1998) (collecting authority). Public employees can and do waive constitutional rights – including the right of political speech – in exchange for employment. *See, e.g., CSC v. Letter Carriers*, 413 U.S. 548 (1973); *Snepp v. United States*, 444 U.S. 507 (1980). Political candidates can [even] surrender some of their speech rights in exchange for a federal subsidy. *See Buckley v. Valeo*, 424 U.S. 1, 57 n.65 (1976).

*Metro East*, 2002 WL 137852, at *5 (emphasis in original). *See also Mitsubishi*, 473 U.S. at 628 ("Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue").

By concluding that federal courts can override the decisions of private parties to forego certain rights or remedies as part of an arbitration agreement, the Court of Appeals has undermined a basic premise of the FAA – that parties can contract to resolve their disputes in arbitration on such terms as they see fit. *See Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989).[9] This interference is troublesome in its own right, but it is made all the more troublesome in the context of this case. The arbitration agreement that binds Dr. Book and PacifiCare, to take one example, is an agreement between *commercial* actors that allows all parties to receive the *full range of compensatory relief* in arbitration (so that they can be "made whole") but also frees *all parties* (including Dr. Book and his affiliated doctors) from the risk of having punitive damages assessed against them. There is no reason that commercial actors should not be allowed to resolve their commercial disputes without resort to punitive damages, but that is exactly the outcome outlawed by the

[9] This Court has remarked that "'[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi*, 473 U.S. at 628). *See also McMahon*, 482 U.S. at 242 (stating that litigants can "effectively vindicate their RICO claim in an arbitral forum"). But it does not follow from this general proposition, which explains why statutory claims are generally arbitrable, that a party may *never* agree to waive statutory remedies as part of a valid agreement to arbitrate, or as the Court of Appeals phrased it in an earlier decision, that "the arbitrability of [statutory] claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies." *Paladino*, 134 F.3d at 1062. The Court has never reached that much broader holding, which would require a special exception in the arbitration context from the rule that parties may validly agree to relinquish statutory rights. Such an exception would be wholly anomalous given that the arbitration setting is one deeply rooted in, and indeed premised on, private agreement. *See Mitsubishi*, 473 U.S. at 625.



Court of Appeals, in contravention of this Court's precedents. *Cf. Mastrobuono*, 514 U.S. at 58 (whether a claim for punitive damages is arbitrable "comes down to *what the contract has to say* about the arbitrability of … [a] claim for punitive damages" (emphasis added)).[10]

**2.** This case also highlights well the danger of allowing district courts to resolve, at the motion to compel arbitration stage, whether damages limitations in an arbitration agreement are enforceable. No arbitration agreement at issue here expressly limits either trebled damages or RICO remedies; instead, all but one of the agreements simply prohibit arbitrators from awarding "punitive damages," while the remaining agreement does not allow an arbitrator to award "extracontractual damages" (which United explained to the Court of Appeals did not restrict an arbitrator's ability to award remedies on statutory causes of action).

Interpreting the meaning of these arbitration provisions, of course, is a task uniquely suited for the decisionmaker whom the parties selected to resolve their disputes – namely, a duly appointed arbitrator. To refuse arbitration in this case, however, the District Court and the Court of Appeals were required to usurp the arbitrator's authority and grant to themselves the power to decide whether RICO trebled damages were "punitive" or "extracontractual." Moreover, they were required to exercise this power without knowing whether Plaintiffs even have a legitimate claim against PacifiCare or United for RICO trebled damages (which cannot be known until the

[10] The District Court expressly found as a factual matter that the parties to the instant dispute are sophisticated actors. *See* 132 F. Supp.2d at 998. Sophisticated commercial actors should be given considerable latitude in structuring their relationships and allocating risks.

appropriate decisionmaker – *i.e.*, an arbitrator – addresses the merits of whether PacifiCare or United violated RICO). Nothing in this Court's precedents supports this outcome; to the contrary, the outcome is inconsistent with the Court's decision in *John Wiley & Sons v. Livingston*, 376 U.S. 543, 557 (1964), which held that "[o]nce it is determined … that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."

**3.** As if the above reasons were not enough to show how the Court of Appeals' decision endangers effective, uniform enforcement of the FAA, an additional flaw taints the decision. In holding that Plaintiffs did not have to arbitrate their RICO claims, neither the District Court nor the Court of Appeals required Plaintiffs to make any showing whatsoever that they would be unable to vindicate their rights in arbitration; the courts simply assumed Plaintiffs could not do so and thus released Plaintiffs from their binding commitments to arbitrate with PacifiCare and United. Just two Terms ago, however, this Court (in reviewing another arbitration decision by the Eleventh Circuit) clearly instructed federal and State courts that the party seeking to escape arbitration under the FAA bears the burden of proving that an arbitration agreement is invalid in the specific context of that party's dispute. *See Green Tree Fina. Corp. v. Randolph*, 531 U.S. 79, 91-92 (2000). By presuming both (a) that the PacifiCare and United arbitration agreements prohibited RICO trebled damages when no agreement expressly so stated, and (b) that this prohibition crippled Plaintiffs' ability to obtain adequate RICO relief, when no Plaintiff offered proof to this effect, the District Court and the Court of Appeals turned *Green Tree* on its head. *See also McMahon*, 482 U.S. at 227 ("The



burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue").[11]

When confronted with a motion to compel arbitration of statutory claims, a federal court conducts a simple and straightforward analysis: It first asks "Is there an agreement to arbitrate between the parties that covers the statutory claims?" If so, it then asks "Is there any external legal constraint that forecloses arbitration of the claims?" *See Green Tree*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 26; *Mitsubishi*, 473 U.S. at 627-28. Here, the District Court found (and the Court of Appeals agreed when it adopted the District Court's opinion) that Plaintiffs had arbitration agreements with PacifiCare and United and that those agreements covered Plaintiffs' RICO claims. This Court has settled the issue that Congress has not imposed a legal constraint against arbitrating RICO claims, *see McMahon*, 482 U.S. at 242, and the District Court did not find any "grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. §2) that voided the parties' arbitration agreements. *See* 132 F. Supp.2d at 997-1000. At this point, the FAA-mandated analysis was complete and Plaintiffs' RICO claims should have been sent to arbitration. That the District Court and Court of Appeals did not stop there and instead grafted a third prong to the FAA analysis – "Are the

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[11] Relieving Plaintiffs of this burden is especially unwarranted in this case because Plaintiffs conceded on appeal that they will not pursue any claim sent to arbitration, including the RICO claims of other defendants that the District Court ordered to arbitration. *See, e.g.*, Appellees' Br. in 11th Circuit Appeal No. 01-10247-CC, at 21 ("Plaintiffs are not going forward with any claim referred to arbitration"). Plaintiffs should not be allowed to avoid arbitration by contending that arbitral remedies are inadequate when they have no intention of going forward with arbitration regardless of the available remedies.

parties' agreed-to remedies adequate?" – turns the otherwise administrable question of whether to compel arbitration into a judicial quagmire. It forces judges to decide what remedies an arbitration agreement permits, how those remedies apply to a plaintiff's claims,[12] and whether those remedies are somehow "adequate."[13] Bogging down motions to compel arbitration with such issues rather than leaving them to be addressed in the first instance by the arbitrator charged with resolving the parties' disputes destroys the twin goals of the FAA (to put arbitration agreements on par with other contracts and to promote their efficient enforcement). *See Gilmer*, 500 U.S. at 24.

### E. At A Minimum, This Petition Should Be Held Pending The Court's Decision In Howsam v. Dean Witter Reynolds, Inc.

The question presented in this case addresses a pure question of law relating to the proper allocation of authority between a district court and an arbitrator: "Whether a district court must compel arbitration of a plaintiff's RICO claims under a valid arbitration agreement even if that agreement does not allow an arbitrator to award punitive damages, leaving to the arbitrator in the first instance the decision of what remedies are available to the RICO plaintiff in arbitration." Page i, *supra*. This question parallels the

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[12] *Compare Investment Partners*, 2002 WL 1498721, at *3 (arbitration clause not allowing for recovery of punitive damages still allows for recovery of trebled damages) *with In re Humana*, 285 F.3d at 973-74 & n.3 (arbitration clause not allowing for recovery of punitive damages also does not allow for recovery of trebled damages).

[13] *Compare Roby*, 996 F.2d at 1366 (arbitration provides for "adequate potential remedies" even if it does not allow for recovery of RICO trebled damages) *with In re Humana*, 285 F.3d at 973-74 & n.3 (arbitration remedies not adequate if they do not allow for recovery of RICO trebled damages).



question presented in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800: "[*W*]*hether a court or the arbitrators should decide* if claims are eligible for arbitration under a self-regulatory organization's arbitration code provision that '[n]o dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy'" (emphasis added).

This Court granted the petition for certiorari to review *Howsam* (a decision by the Tenth Circuit) on February 25, 2002 and will decide *Howsam* during the October 2002 Term. The Court's decision will inevitably address the proper allocation of authority between a court asked to compel arbitration versus an arbitrator selected by the parties to arbitrate their substantive disputes. If the Court reverses the Tenth Circuit's judgment in *Howsam*, its rationale will almost certainly require the reversal of the judgment by the Court of Appeals in *In re Humana* as well. *Howsam*, after all, involves a question of whether a court or an arbitrator decides if a plaintiff's claim is time-barred, which is an issue normally addressed *before* a decisionmaker reaches the merits of a dispute. If a court at the motion to compel stage is required to leave such an issue to an arbitrator to decide, the court also must leave for an arbitrator the issue of whether the parties' agreed-to remedies are adequate, since that issue can only be addressed *after* a decisionmaker reaches (and resolves) the merits of a dispute.

If this Court is not inclined to grant the current petition based on the reasons set forth in the preceding sections, then at the least the Court should hold this petition until it resolves *Howsam*. When the Court's resolution of a case already set for argument is likely to address issues germane to a pending petition for certiorari, it is consistent with Court

practice to hold the petition until the Court decides the case and thereafter to grant the petition, vacate the judgment on which the petition is based, and remand the matter to the court that originally issued the judgment for reconsideration in light of the Court's recent decision. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 192-93 (7th ed. 1993). The Court should follow this well-charted course here if it believes that full review of the Court of Appeals' decision is unnecessary.

## III. CONCLUSION.

For the foregoing reasons, Petitioners PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., United HealthCare, Inc. and UnitedHealth Group Incorporated respectfully requests that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its judgment in *In re Humana Inc. Managed Care Litigation*. Alternatively, Petitioners respectfully request that this Court hold this petition pending its decision in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, and, after that decision is issued, grant this petition, vacate the Court of Appeals' judgment, and remand this matter to the Court of Appeals for further proceedings consistent with *Howsam*.



DATED: August 6, 2002.

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# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-10247 & 01-12596

In re: HUMANA INC. MANAGED CARE LITIGATION

Price Plaintiffs, Price, Sessa, Katz & Yingling, Sandra Johnson, Patricia Freyre, Regina Joi Price, Anthony Sessa, Arnold Katz, et al.,
Plaintiffs-Appellees,

v.

Humana Insurance Company, Coventry Health Care of Georgia, Inc., f.k.a. Principal Health Care of Georgia, Inc., Principal Health Care, Inc., et al.,
Defendants,

PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., United Health Care, United Health Group, Foundation Health Systems, Inc., Wellpoint Health Networks, Inc., Prudential Insurance Company of America,
Defendants-Appellants.

Leonard J. Klay, M.D., Price Plaintiffs, Price, Sessa, Katz & Yingling, Sandra Johnson, Patricia Freyre, Regina Joi Price, Anthony Sessa, Arnold Katz, et al.,
Plaintiffs-Appellees,

v.

Humana, Inc., et al.,
Defendants,

PacifiCare Health Systems, Inc., PacifiCare Operations, Inc.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida.

Filed March 14, 2002

Before BARKETT, FAY and WINTER,* Circuit Judges.

BARKETT, Circuit Judge:

The Defendants appeal the district court's order granting in part and denying in part their motion to compel arbitration. In this case, a group of doctors, acting on behalf of themselves and others similarly situated, have sued several HMOs on various grounds– including RICO, ERISA, quantum meruit, breach of contract, federal clean claim payment regulations, unjust enrichment, and state prompt pay statutes. The suit is made particularly complicated by the wide array of different relationships among the various parties in the action, relationships that we need not elaborate here beyond noting the following: some of the doctors had contracts with some of the HMOs; some of those contracts had arbitration clauses; and some of those arbitration clauses placed limitations on the sort of damages an arbitrator may award.[1] The task facing the district court was, in short, to

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* Honorable Ralph K. Winter, U.S. Circuit Judge for the Second Circuit, sitting by designation.

1 For example, plaintiff Dr. Breen is suing Prudential, PacifiCare, and United, among other defendants. Breen has contracts with Prudential and PacifiCare, but not with United. Breen's contract with Prudential contains an arbitration clause that allows a party to arbitrate a claim that "arises out of or relates to this agreement or its terms." Breen's contract with PacifiCare contains a similar clause, with the additional proviso "that punitive damages shall not be awarded." Breen has no contract with United (although plaintiffs Porth and Kelly do).



determine which of the various legal claims must be resolved through arbitration.

The district court made four rulings related to this appeal. First, the court held that claims between plaintiffs and defendants who are both signatories to contracts containing enforceable arbitration clauses must be arbitrated.[2] Second, relying primarily on our opinion in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), the court found that those arbitration clauses that exclude punitive damages are unenforceable in this suit because they preclude recovery of treble damages under RICO; therefore, an HMO may not compel arbitration of a RICO suit under such an arbitration clause.[3] Third, the court determined that an HMO may not invoke its arbitration clause to compel arbitration of an aiding-and-abetting charge regarding a doctor's contractual rights with a different HMO.[4] Fourth, the court held that exceptions to the general rule that a non-party to a contract may not invoke the contract – exceptions we described in *MS Dealer Corp. v. Franklin*, 177 F.3d 942 (11th Cir. 1999) – do not apply in the present case; thus an HMO that is not a signatory to a

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2 Thus, following the above example, Breen's suit against Prudential must be arbitrated.

3 Again following the above example, PacifiCare may not compel Breen to arbitrate his RICO claim against PacifiCare because the contract between them prevents the arbitrator from awarding punitive damages.

4 This means, for example, that Prudential may not compel Breen to arbitrate a claim in which Breen alleges that Prudential conspired with PacifiCare to impair PacifiCare's contractual obligations to Breen (i.e., concerning care of Breen's patients covered under a PacifiCare plan). However, Prudential may compel Breen to arbitrate his claims related to its own contractual relationship with Breen (*i.e.*, regarding Breen's patients covered under a Prudential plan).

particular contract may not invoke that contract's arbitration clause to compel arbitration.[5]

We affirm in its entirety the district court's order for the reasons set forth in its comprehensive opinion found at 132 F.Supp.2d 989 (S.D. Fla. 2000). We agree that under the circumstances here *MS Dealer* does not compel application of equitable estoppel. In *MS Dealer*, the plaintiff, Franklin, bought a car pursuant to a "Buyers Contract" with Jim Burke Motors. The Buyers Contract incorporated by reference a retail installment contract, in which Franklin was charged $990.00 for a service contract through MS Dealer. Franklin subsequently sued both Jim Burke and MS Dealer for conspiracy and fraud. MS Dealer, a nonsignatory to the Buyers Contract, attempted to invoke that contract's arbitration clause to compel arbitration. Noting that "there are certain limited exceptions, such as equitable estoppel, that allow[ ] non signatories to a contract to compel arbitration," this Court found that MS Dealer could compel arbitration. *Id.* at 947. In discussing those exceptions, *MS Dealer* relied primarily on *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993) and *Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423 (M.D. Ala. 1997).

In *Sunkist*, the plaintiff, Sunkist Growers, Inc. (SGI), sought to avoid arbitration as provided by the contractual agreement between SGI and Sunkist Soft Drinks, Inc. (SSD). Subsequent to the agreement between the SGI and SSD, Del Monte purchased SSD. When SGI sued Del Monte over the terms of the agreement between SGI and SSD, Del Monte

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[5] This means, for example, that in Breen's suit against Prudential, PacifiCare and United, United may not compel Breen to arbitrate based on his enforceable arbitration provision with Prudential.



sought arbitration pursuant to that agreement. SGI argued that Del Monte could not compel arbitration because it was not a signatory to the contract. This Court held that SGI was equitably estopped from avoiding arbitration because SGI was suing under the same contract that provided for arbitration and, thus, should not be permitted to rely on some contractual terms but avoid others. *Sunkist* at 758. We noted that Del Monte was the parent company of SSD, and that after the purchase of SSD, Del Monte had ceased operating it as an independent enterprise. *Id.* Thus, the direct nexus between all of SGI's claims and the agreement as well as the integral relationship between SSD and Del Monte led us to conclude that SGI's claims were intimately founded in and intertwined with the agreement, and the plaintiff was thus equitably estopped from denying the non-signatory defendant's right to compel arbitration. *Id.*

In *Boyd*, plaintiffs purchased mobile homes from several mobile home dealers, homes which had been manufactured by Homes of Legend (Homes). The purchases were made pursuant to retail installment and security agreements between the plaintiffs and the dealers, agreements that contained arbitration clauses. Homes was not a party to nor mentioned in these contracts for sale. The plaintiffs sued Homes, *inter alia*, for breach of their written express warranties on the mobile homes, alleging defects in materials and workmanship. They also alleged that their homes were covered under a myriad of state and federal consumer warranties– including implied and non-written warranties of merchantability, habitability, and freedom from defects– and that Homes' conduct violated the those warranties as well as the consumer protection provisions of the Magnuson-Moss Act. Some plaintiffs also sued the dealers. Homes attempted to compel arbitration based on the

arbitration clauses in the retail installment contracts between the various plaintiffs and dealers.

The *Boyd* court ruled that Homes could not compel arbitration by invoking plaintiffs' arbitration agreements with the dealers, in part, because plaintiffs did not "advance the theory that the [dealer] defendants acted as Homes of Legend's front in committing the alleged frauds," but, rather, "pursue[d] parallel claims of fraudulent conduct against two separate commercial entities who have common, but decidedly distinct, duties toward them ...." *Boyd* at 1434. *Boyd* observed that this scenario was completely distinct from two previous cases in which it had applied equitable estoppel:

> In both instances, this court applied the doctrine of equitable estoppel, concluding that the plaintiffs' allegations of such pre-arranged, collusive behavior established that their claims against the insurers were intimately founded in and intertwined with the obligations imposed by the underlying loan agreements . . . . In *Staples*, this court emphasized that the plaintiff's "claims against the [the insurers were] derivative of, and predicated on, her claims against [the lender]; if she had no claim against [the lender], she had no claim against [the insurers]." 936 F.Supp. at 859. In *Roberson*, this court emphasized that the holding was a result of the plaintiffs' allegations of "common breaches of duties by all defendants working hand-in-hand," essentially acting on behalf of each other to commit a common and



> conspiratorial fraud. 954 F.Supp. at 1522, 1529.

*Boyd* at 1433.

In *Sunkist*, because the plaintiff's claims against the nonsignatory defendant were based upon, and inextricably intertwined with, the written agreement of the parties, we compelled arbitration. In *Boyd*, the plaintiff's causes of action against Homes were based on duties separate and apart from those arising out of the retail installment contract between the plaintiffs and the dealers, and did not allege collusion between the defendants to defraud the plaintiffs as to the terms of that contract. Thus, the nonsignatory defendant was not entitled to compel arbitration. Applying *Sunkist* and *Boyd*, *MS Dealer* concluded that defendant MS Dealer could invoke equitable estoppel to compel arbitration of plaintiff Franklin's suit, because "each of [Franklin's] fraud and conspiracy claims depend[ed] entirely upon her contractual obligation to pay $990.00 for the service contract," *MS Dealer* at 948, and moreover because

> [Franklin] specifically alleges that MS Dealer worked hand-in-hand with Jim Burke ... in this alleged fraudulent scheme. Her "allegations or such pre- arranged, collusive behavior establish[ ] that [her] claims against [MS Dealer are] intimately founded in and intertwined with the obligations imposed by the [Buyers Order]."

*Id.* (quoting *Boyd* at 1433).

A plaintiff's allegations of collusive behavior between the signatory and nonsignatory parties to the contract do not

automatically compel a court to order arbitration of all of the plaintiff's claims against the nonsignatory defendant; rather, such allegations support an application of estoppel only when they "establish[ ] that [the] claims against [the nonsignatory are] intimately founded in and intertwined with the obligations imposed by the [contract containing the arbitration clause]." *Id.* The HMOs nonetheless direct our attention to more general language from *MS Dealer*, which notes that equitable estoppel may be appropriate "when the signatory [to the contract containing the arbitration clause] raises allegations of . . . substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract." *Id.* (quoting *Boyd* at 1433). The HMOs contend that this language mandates an application of equitable estoppel in this case simply because the doctors allege a RICO conspiracy.

This contention is only tenable if the passage is read completely out of context. *MS Dealer* "is not a rigid test, and each case turns on its facts." *Hill v. G E Power Systems, Inc.*, __ F.3d __ (5th Cir. 2002) (holding that district court did not abuse its discretion in declining to apply doctrine of equitable estoppel even though complaint alleged collusive scheme to defraud). In all cases, "'the lynchpin for equitable estoppel is equity,' and the point of applying it to compel arbitration is to prevent a situation that 'would fly in the face of fairness.'" *Id.* at ___ (quoting *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir. 2000)). The purpose of the doctrine is to prevent a plaintiff from, in effect, trying to have his cake and eat it too; that is, from "rely[ing] on the contract when it works to [his] advantage [by establishing the claim], and repudiat[ing] it when it works to [his] disadvantage [by requiring arbitration]." *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp. 688, 692



(S.D.N.Y. 1966). The plaintiff's actual dependence on the underlying contract in making out the claim against the nonsignatory defendant is therefore always the *sine qua non* of an appropriate situation for applying equitable estoppel.

In light of the foregoing, we agree with the district court that the present RICO suit does not present an appropriate circumstance for equitable estoppel, and even if we did not agree, we would be hard pressed to identify any abuse of discretion in the court's decision to forego application of the doctrine. *See Grigson* at 528 ("whether to utilize equitable estoppel in this fashion is within the district court's discretion; we review to determine only whether it has been abused."). Here, the doctors' suit does not rely upon or presume the existence of an underlying contract; the RICO claims in this case are based on a statutory remedy Congress has provided to any person injured as a result of illegal racketeering activities.[6] This remedy stands apart from any available remedies for breach of contract, and clearly is not "intimately founded in and intertwined with the underlying contract obligations." *McBro Planning and Development Co. v. Triangle Const. Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984) (quoting *Hughes Masonry Co. v. Greater Clark County School Bldg. Corp.*, 659 F.2d 836, 841 n.9 (7th Cir. 1981)). Thus, the doctors in the present suit are not effectively "attempting to hold [a non-signatory HMO] to the terms of [a signatory HMO's] agreement." *Hughes Masonry* at 838.

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[6] 18 U.S.C. § 1964(c) provides, in relevant part, that " Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee ...."

Moreover, although the doctors in this case do claim fraudulent collusive behavior by the HMOs, they make no suggestion that the contracts containing arbitration clauses are themselves the product of, or in any way related to, the HMO's conspiratorial behavior. This situation is different from *MS Dealer*, in which the plaintiffs alleged that the signatory and nonsignatory defendants had colluded to defraud by including an excessively expensive installment contract in a buyers order (sharing in the illicit profits), and the only claims against the nonsignatory defendant were related to that retail installment contract. In contrast, here the alleged fraudulent scheme does not differentiate between doctors with contracts and those without, and the RICO claims are unrelated to any of the contractual relationships that exist between the doctors and the HMOs. Therefore, the fact that the doctors' complaint alleges a RICO conspiracy provides no basis in equity for allowing a nonsignatory HMO to avail itself of an arbitration agreement that a coconspirator signatory HMO happens to have with a plaintiff doctor.

AFFIRMED.



United States District Court
Southern District of Florida
Miami Division

In re: MANAGED CARE LITIGATION
This Document Relates To All Cases.

No. MDL 1334
No. 00-1334-MD

Filed Dec. 11, 2000

**ORDER GRANTING IN PART AND DENYING IN PART VARIOUS DEFENDANTS' MOTIONS TO COMPEL ARBITRATION**

MORENO, District Judge.

This multi-district litigation involves two separate categories of plaintiffs who have filed suit against various insurance companies that provide managed care. One group of plaintiffs consists of subscribers (patients) who allege causes of action against managed care companies under RICO, ERISA, and common law civil conspiracy. The other group of plaintiffs consists of providers (doctors) who allege causes of action against managed care companies under various legal theories, including RICO, ERISA, *quantum meruit*, breach of contract, federal clean claim payment regulations, unjust enrichment, and state prompt pay statutes.

Certain defendants seek to compel certain plaintiffs to arbitrate the issues raised in this lawsuit, based upon arbitration clauses contained in the contracts that form the basis of the plaintiffs' claims. This Order shall determine

which plaintiffs are bound by contract to use arbitration as the forum to resolve certain claims asserted against certain managed care companies.

## WHETHER TO COMPEL ARBITRATION

### I. THRESHOLD MATTERS TO BE RESOLVED PRIOR TO ANALYZING EACH ARBITRATION CLAUSE

Prior to deciding each of the defendants' motions to compel arbitration individually, the Court must address certain threshold matters that relate to all of the motions to compel arbitration. These are: (A) the Federal Arbitration Act's (the "FAA's" or the "Act's") strong presumption in favor of arbitration, (B) whether ERISA claims may be arbitrated, (C) whether allegations of conspiracy and aiding and abetting may be arbitrated, absent a contract to arbitrate between the parties, (D) whether a nonsignatory to an arbitration clause may be compelled to arbitrate due to the relationship between the nonsignatory and a signatory to the arbitration agreement, (E) the impact of the Eleventh Circuit decisions in *Paladino v. Avnet Computer Tech., Inc.*, 134 F.3d 1054 (11th Cir.1998), and *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir.1999) *rev'd in part Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000), (F) whether class action implications affect whether to compel arbitration, and (G) whether the doctrine of unconscionability is useful in determining the validity of the arbitration clauses at issue. After addressing each of these matters, the Court shall analyze each motion to compel separately to determine which, if any, claims must be arbitrated.



#### A. The Federal Arbitration Act's Presumption in Favor of Arbitration

Section 4 of the FAA provides in relevant part:

> A party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court ... for an order directing that such arbitration proceed in the manner provided for in such agreement.... [T]he court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4.

The FAA establishes a strong federal policy in favor of arbitration and creates "a body of substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the act." *Moses H. Cone Memorial Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). The scope of the Act's provisions concerning the validity of arbitration clauses reaches to the farthest limits of Congress' power under the Commerce Clause. *Paladino*, 134 F.3d at 1060. There is no dispute that the defendants in this action are engaged in interstate commerce, and accordingly, the Act applies to the present motions to compel arbitration.

Section 2 of the FAA provides that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. As the Supreme Court in *Cone* instructs, this language reflects "a liberal federal policy favoring arbitration agreements,

notwithstanding any state substantive or procedural policies to the contrary." *Cone*, 460 U.S. at 24, 103 S.Ct. 927. "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration...." *Id.* at 24-25, 103 S.Ct. 927.

The strong federal policy in favor of arbitration applies to statutory claims with equal force. *E.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). If the plaintiffs' allegations "touch matters" covered by the arbitration agreement, then those claims must be arbitrated, irrespective of how the allegations are labeled. *Id.* at 625 n. 13. This approach furthers the Act's strong presumption in favor of arbitration. *Id.* at 626, 105 S.Ct. 3346 ("[T]he parties' intentions control, but those intentions are generously construed as to issues of arbitrability.").

**B. Whether ERISA Claims Are Subject to Arbitration**

The first threshold issue presented by the various motions to compel arbitration, raised in both provider and subscriber track motions to compel, is whether ERISA claims may be arbitrated. While the Supreme Court has ruled that RICO and antitrust claims are subject to arbitration, *Shearson/American Express v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (holding RICO claims arbitrable); *Mitsubishi*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (holding antitrust claims arbitrable), there has been no such determination with respect to ERISA claims. The Eleventh Circuit has not yet ruled upon the issue, but many circuit courts have ruled that ERISA claims are arbitrable. *Williams v. Imhoff*, 203 F.3d 758 (10th Cir.2000); *Kramer v. Smith Barney*, 80 F.3d 1080 (5th



Cir.1996); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3rd Cir.1993); *Bird v. Shearson Lehman/American Express, Inc.*, 926 F.2d 116 (2nd Cir.1991); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds*, 847 F.2d 475 (8th Cir.1988).

Plaintiffs argue that the Eleventh Circuit would follow the Ninth Circuit decision, *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir.1984), which holds that ERISA claims are not arbitrable. The *Amaro* ruling rests upon the assumption that "[a]rbitrators, many of whom are not lawyers, ... lack the competence to interpret and apply statutes as Congress intended." *Id.* at 750 (citation omitted).

This Court rejects the plaintiffs' argument and finds that ERISA claims are subject to arbitration, in view of the Act's strong presumption in favor of arbitration discussed above. The Court also finds persuasive Supreme Court rulings finding that arbitration is an appropriate forum for RICO and antitrust injuries to be vindicated. An arbitrator can resolve ERISA claims with the same skill, precision, and competence as RICO or antitrust claims. Moreover, there is no language in ERISA that leads to a finding that Congress did not intend to have ERISA claims arbitrated.

The limiting factor with respect to this ruling that ERISA claims are subject to arbitration is that the arbitration clause at issue must afford the plaintiffs the opportunity of meaningful relief in an arbitration proceeding. *Paladino*, 134 F.3d at 1062. This limiting factor will be addressed below in Section I(E), where the Court will address the impact of two Eleventh Circuit decisions, *Paladino* and *Randolph*, upon the instant motions to compel arbitration. This limiting factor also will be addressed with respect to

certain arbitration clauses individually in Section II of this Order.

### C. Whether Allegations of Conspiracy and Aiding and Abetting May Be Arbitrated Where There is No Contract to Arbitrate Between the Parties

The next threshold issue presented by both subscriber and provider track motions to compel arbitration is whether conspiracy and aiding and abetting allegations may be arbitrated where there is no contract to arbitrate between the parties. This scenario occurs, for example, where Plaintiff A sues Defendants B, C, and D alleging conspiracy to violate 18 U.S.C. § 1962(a) and (c) in violation of 18 U.S.C. § 1962(d), and for seeking to aid and abet and for aiding and abetting violations of 18 U.S.C. § 1962(a) and (c) within the meaning of 18 U.S.C. § 2. Plaintiff A has agreed to resolve such claims with Defendant B through arbitration, but has no contractual relationship with Defendants C and D – who have no relation to Defendant B except that all three defendants are separate operators of separate managed care companies.

Plaintiffs posit that there can be no arbitration of the conspiracy and aiding and abetting claims against nonsignatories (Defendants C and D in the above example) because the plaintiffs have not contracted with these parties to arbitrate such disputes. *E.g., Morewitz v. West of England,* 62 F.3d 1356, 1363 (11th Cir.1995) (*quoting In re Talbott Big Foot, Inc.,* 887 F.2d 611, 612 (5th Cir.1989) ("We are unaware of any federal policy that favors arbitration for parties who have not contractually bound themselves to arbitrate their disputes.")). Defendants argue that these claims must be arbitrated, relying upon the



Eleventh Circuit reasoning in *MS Dealer Service Corp. v. Franklin,* 177 F.3d 942 (11th Cir.1999).

Notwithstanding the general rule that only parties who agree to arbitrate may be compelled to do so, the Eleventh Circuit has ruled that there exist limited circumstances where a matter will be compelled to arbitration, absent a signed agreement between the parties. *Id.* at 947 (*citing Sunkist Soft Drinks, Inc. v. Sunkist Growers Inc.,* 10 F.3d 753 (11th Cir.1993)). These are: (1) equitable estoppel, (2) agency or related principles concerning signatory defendants and nonsignatory defendants, and (3) third party beneficiary relationships. *MS Dealer*, 177 F.3d at 947.

Defendants' reliance on *MS Dealer*, where the court found equitable estoppel existed, is misplaced. That case involved a consumer transaction where Ms. Franklin executed a "Buyers Order" to purchase a vehicle from Jim Burke Motors, Inc. The Buyers Order incorporated by reference a Retail Installment Contract, which Ms. Franklin purchased for $990.00, and also contained a valid arbitration clause. Ms. Franklin filed suit after purchasing the car, asserting claims for breach of contract, breach of warranty, fraud, and civil conspiracy between signatory defendant Jim Burke Motors Inc. and nonsignatory defendant MS Dealer. Among other allegations, Ms. Franklin claimed that both parties shared in the excessive profits from the Retail Installment Contract. The only claims asserted against MS Dealer related to the Retail Installment Contract. MS Dealer moved to compel arbitration, based upon the Buyers Order arbitration clause, and Ms. Franklin objected on the ground that there was no signed agreement to arbitrate between herself and MS Dealer. *Id.* at 944-45.

The *MS Dealer* court found that Ms. Franklin was equitably estopped from objecting to arbitration of the dispute under both circumstances where equitable estoppel arises. First, equitable estoppel arises where a signatory to a written agreement must rely on the terms of the agreement in asserting its claims against the nonsignatory. *Id.* at 947 (*citing Sunkist*, 10 F.3d at 757). Under this form of equitable estoppel, there also must be a close relationship between nonsignatory and signatory defendants, which did exist between signatory defendant Jim Burke Motors Inc. and nonsignatory defendant *MS Dealer*. *See Sunkist*, 10 F.3d at 757. Second, equitable estoppel applies where there is interdependence and concerted misconduct between the nonsignatory and signatory defendants. Otherwise, the arbitration proceeding between the two signatories would be rendered meaningless and the federal policy in favor of arbitration thwarted. *MS Dealer*, 177 F.3d at 947.

In the instant action, the plaintiffs allege violations against parties bound to arbitrate ("signatories") and seek to hold nonsignatories liable for conspiracy and aiding and abetting. Some signatory defendants have valid arbitration clauses that will be enforced, while other signatory defendants will litigate before the undersigned either for lack of an arbitration agreement or an invalid arbitration agreement. The issue before the Court is whether the nonsignatory defendants may compel arbitration, relying upon the doctrine of equitable estoppel.

With respect to the first way to find equitable estoppel discussed above, there is a distinguishing factor between this case and *MS Dealer* and *Sunkist*; namely, the relationship between signatory defendants and nonsignatory defendants. In *MS Dealer*, the defendants worked in concert to sell vehicles with retail installment contracts included in the



purchase agreement for the vehicle. In *Sunkist*, which involved licensing issues, the nonsignatory, Del Monte, acquired all of the stock of signatory Sunkist Soft Drinks. The instant action is distinguishable because the signatory managed care company and nonsignatory manage care companies do not have the requisite "close relationship" needed to find equitable estoppel. *Sunkist*, 10 F.3d at 757.

With respect to the second way to find equitable estoppel, this Court finds the doctrine inapplicable to the current action. The *MS Dealer* court was concerned with thwarting the FAA by a scenario where the nonsignatory defendant would litigate the same action in federal court that the signatory defendant would arbitrate concurrently. The present action is much more complex, involving many more parties. The concern that the FAA will be thwarted does not exist in the present scenario. In fact, this Court is painstakingly following the FAA's mandate to arbitrate whatever the parties agree to arbitrate, even though it will lead to concurrent proceedings. While the Court believes that it would be most efficient to have all claims heard either in Federal court or in front of an arbitrator due to the strong likelihood of concurrent proceedings before itself and multiple arbitrators, the Supreme Court has instructed otherwise. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (holding that Federal Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims, "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums."). As such, the Court will compel arbitration of whichever claims are

deemed arbitrable and retain jurisdiction to hear all other claims.[7]

Here, it is inevitable, based upon this Order, that some signatory defendants will be forced to arbitrate certain claims, while the same claims will be litigated before the undersigned concurrently. This Court will be hearing the same RICO issues (including RICO conspiracy and aiding and abetting by nonsignatories) with respect to defendants that do not have arbitration clauses in their agreements with the plaintiffs, or whose arbitration clauses are ruled invalid. By way of example, Humana either does not have an arbitration clause in its agreements with providers or it does not move to compel arbitration. The plaintiffs allege conspiracy and aiding and abetting against the other named defendants in this action, stemming from Humana's contractual relationship with the plaintiffs. All nonsignatory defendants to the Humana agreements will be forced to defend the conspiracy and aiding and abetting claim in front of the undersigned. Accordingly, this Court does not find the justification necessary (i.e. the thwarting of the FAA) to allow nonsignatories to an arbitration agreement to compel arbitration based upon the doctrine of equitable estoppel.[8]

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[7] Moreover, as the Eleventh Circuit instructs in *Protective Life Ins. Corp. v. Lincoln Nat'l Life Ins. Corp.*, 873 F.2d 281 (11th Cir.1989), each party shall have individualized arbitration. There shall be no bundling of the various named plaintiffs' claims that this Court deems arbitrable, unless an arbitrator rules otherwise. The Court takes no position on whether any of these arbitrations may become class action arbitrations.

[8] The Court also does not find an agency or third party beneficiary relationship present to compel arbitration between the nonsignatories. *MS Dealer*, 177 F.3d at 947.



**D. Whether a Nonsignatory to an Arbitration Agreement May Be Compelled to Arbitrate**

A related issue concerning nonsignatories to arbitration agreements arises (1) where a plaintiff sues a parent company, concerning an agreement between the plaintiff and the parent's subsidiary (or affiliate), where only the subsidiary has contracted with the litigant to arbitrate; and (2) where a nonsignatory plaintiff sues a signatory defendant, based upon an agreement (that contains an arbitration clause) between the defendant and a third party to whom the plaintiff is affiliated. The principles enumerated by the Eleventh Circuit in *MS Dealer* for justifying a nonsignatory to arbitrate discussed above apply with equal force to these issues, but lead to a different result. *MS Dealer,* 177 F.3d at 947.

The Court finds that under either theory of equitable estoppel, as well as under the agency and third party beneficiary exceptions, a nonsignatory parent should be compelled to arbitrate where either (a) the signatory subsidiary or affiliate is compelled to arbitrate, or (b) the nonsignatory parent benefits from the contractual relations of its subsidiary's relationship with the plaintiffs – irrespective of whether the subsidiary is a party to the lawsuit. Likewise, the Court finds that a nonsignatory plaintiff is bound to arbitrate disputes against a signatory defendant, where the plaintiff brings suit based upon an agreement between the defendant and a third party to whom the defendant is affiliated.

**E. The Impact of the of the Eleventh Circuit Holdings in Paladino and Randolph**

The next issue before the Court is the Eleventh Circuit's rulings in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir.1998), and *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir.1999) *rev'd in part Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 121 S.Ct. 513, 148 L.Ed.2d 373 (2000). Not surprisingly, these cases have received quite a bit of attention from the litigants in this action. Based upon the holdings in these two cases, the plaintiffs seek to negate contractual obligations to arbitrate disputes between the parties because the arbitration forum does not provide meaningful relief for the plaintiffs' statutory claims. Defendants argue that the cases are distinguishable and that an arbitration forum can meaningfully resolve all of the plaintiffs' claims.

Despite the FAA's strong presumption in favor of arbitrating all disputes as agreed between the parties, the Eleventh Circuit has refused to permit arbitration of certain statutory disputes under limited circumstances. *See Paladino*, 134 F.3d at 1062 ("[T]he arbitrability of such claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies."). In *Paladino*, the court refused to enforce the parties' employment agreement to arbitrate all disputes between the parties. In relevant part, the arbitration agreement permitted the arbitrator to award damages for breach of contract, but prohibited the arbitrator from awarding any other type of damages. *Id.* at 1056.

The *Paladino* court based its holding on two grounds. First, the court found that the clause prohibiting extra contractual damages denied the plaintiff of any meaningful



relief for her Title VII claims. "This clause defeats the statute's remedial purposes because it insulates Avnet from Title VII damages and equitable relief." *Id.* at 1062. Second, the court found that the statutory policy behind Title VII would be frustrated further by the parties' agreement to arbitrate through the American Arbitration Association ("AAA"), which charges high fees – $2,000 in this case. "[A] clause such as this one that deprives an employee of any hope of meaningful relief, while imposing high costs on the employee, undermines the policies that support Title VII." *Id.*

In *Randolph*, the plaintiff alleged violation of the Truth in Lending Act ("TILA") because the defendant required her to obtain "vendor's single interest" insurance in connection with the financing of the purchase of her mobile home, but did not include the requirement in its TILA disclosure. The arbitration clause in the retail installment agreement governed all disputes between the parties, and granted the arbitrator authority to award money damages, declaratory relief, and injunctive relief. However, the arbitration clause made no mention of what organization shall conduct the arbitration, whether the parties were to share the expenses of the arbitration, or what the filing fees of the arbitration would be. *Randolph*, 178 F.3d at 1151.

In holding the arbitration clause unenforceable, the *Randolph* court was concerned that the plaintiff's statutory rights under TILA would not be vindicated in an arbitration forum due to the exorbitant cost of initiating arbitration as compared to the "small sum" of plaintiff's claims. *Id.* at 1158 ("[T]he arbitration clause ... fail[ed] to provide minimum guarantees required to ensure that Randolph's ability to vindicate her statutory rights will not be undone by steep filing fees, steep arbitrator's fees, or other high costs of

arbitration."). Perhaps realizing the potentially far reaching effect of its holding, the court distinguished this "small consumer transaction," as well as the employment agreement in *Paladino,* from other contexts, such as commercial franchise agreements. *Id.* at 1159.

The issue before this Court is how these cases relate to both the provider track and subscriber track agreements to arbitrate. Beginning with the provider track plaintiffs, they argue that their statutory rights under RICO and ERISA will not be vindicated in an arbitration forum, and that they will not be able to obtain meaningful statutory relief through arbitration. The burden of establishing this proposition rests with the provider plaintiffs. *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 121 S.Ct. 513, 522, 148 L.Ed.2d 373 (2000); *see also Shearson/American Express,* 482 U.S. at 225-26, 107 S.Ct. 2332.

The issues raised by *Paladino* concerning limitation of an arbitrator's authority to award extra contractual damages will be addressed individually below in Section II, where the Court will determine whether any of the arbitration agreements at issue prevent meaningful relief in an arbitration forum due to a limitation on extra contractual damages.

With respect to the *Randolph* (and to a lesser extent *Paladino*.) concern that steep filing fees and costs of arbitration will prevent meaningful relief through arbitration, the Court declines the provider track plaintiffs' invitation to expand the Eleventh Circuit holdings. The Eleventh Circuit decision in *Randolph* made clear that its holding was limited to small consumer transactions concerning small sums of money, as well as Title VII claims in employment relationships. This Court finds the relationship between



sophisticated groups of doctors and managed care companies, where the doctors contract to provide health care to large groups of patients, quite distinguishable.

Another distinguishing factor between *Randolph* and the instant action is the alleged amount in controversy. In *Randolph*, the amount in controversy was a "small amount" stemming from a failure to disclose a requirement to purchase vendor insurance in connection with the purchase of a mobile home. In the instant action, the provider plaintiffs attempt to persuade the court that their statutory claims are too small to combat the hefty costs of arbitration. This argument is unpersuasive because each provider plaintiff alleges multiple instances of statutory violations over an extended period of time. In aggregate, each provider plaintiff allegedly has suffered considerable harm. These aggregate claims may be arbitrated by each plaintiff who has signed a valid and enforceable arbitration agreement.

Moreover, today the Supreme Court reversed in part the *Randolph* decision, ruling that an arbitration agreement that is silent with respect to arbitration costs does not render the agreement unenforceable. *Green Tree Fin. Corp. v. Randolph,* 531 U.S. 79, 121 S.Ct. 513, 521-22, 148 L.Ed.2d 373 (2000) ("The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidating of an arbitration agreement."). While the Supreme Court did acknowledge that "the existence of large arbitration costs could preclude a litigant ... from effectively vindicating her federal statutory rights in the arbitral forum[,]" *id.* at 10, the Court was "mindful of the FAA's purpose to reverse the longstanding judicial hostility to arbitration agreements and to place arbitration agreements upon the same footing as other contracts." *Id.* at 9 (quotation and citation omitted).

In total, the doctors are sophisticated individuals, not consumers alleging TILA violations in connection with the purchase of a mobile home or employees suing under Title VII. The Court is unpersuaded that the provider track plaintiffs' statutory claims will not be vindicated in an arbitration forum due to excessive filing fees and costs. *Green Tree Fin. Corp.*, 531 U.S. 79, 121 S.Ct. 513, 522, 148 L.Ed.2d 373 (stating that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration); *see also Williams v. Cigna*, 197 F.3d 752, 763-64 (5th Cir.1999) (enforcing arbitration clause absent evidence that plaintiff cannot afford to pay half the filing fees). To rule otherwise would expand the Eleventh Circuit's holdings and frustrate the FAA's strong presumption in favor of arbitration.

In contrast, the subscriber plaintiffs are in a better position to argue that their claims are analogous to the consumer transaction or employment relationships addressed by the Eleventh Circuit. The subscriber plaintiffs are individuals who have contracted, through their employer, to receive managed care from the defendants. They allege statutory violations stemming from being overcharged for the price of their managed care due to misrepresentations and omissions. Because there is only one subscriber defendant who seeks to compel arbitration, it is most efficient for the Court to acknowledge the potential analogy, and determine whether Plaintiff Hitsman may avail herself of the *Randolph* holding now. (All other issues concerning Plaintiff Hitsman's arbitration clause will be addressed below in Section III.)

Plaintiff Hitsman argues that her agreement to arbitrate disputes with PacifiCare-Oklahoma will deny her the ability to vindicate her statutory claims. However, in contrast to the



*Randolph* arbitration agreement that did not discuss which organization would arbitrate or how costs would be shared, Plaintiff Hitsman's arbitration agreement is governed by JAMS/Endispute and states that the fees and expenses of the arbitrator and neutral administrator will be divided equally. The filing fee for a JAMS/Endispute arbitration is $250. Accordingly, the concerns raised in *Randolph* involving steep filing fees and uncertainty as to whom shall bear the brunt of these unknown fees do not exist here. Moreover, the Court is unpersuaded that the amount in controversy for Plaintiff Hitsman is such a "small sum" as the plaintiff's injury in *Randolph*. Plaintiff Hitsman has failed to meet her burden on this point, as well as her burden of establishing that her statutory rights will not be vindicated in an arbitration forum due to excessive filing fees. The *Randolph* holding will not assist Plaintiff Hitsman in opposing the motion to compel arbitration.

### F. Whether Class Action Implications Affect Whether to Compel Arbitration

The next issue concerning both subscriber and provider cases concerns the potential that this Court may certify this case as a class action. Named plaintiffs who may be forced to arbitrate their claims seek to prevent arbitration on the ground that this multi-district litigation is a class action, and that other, unnamed plaintiffs will surface who are not required to arbitrate. Following this argument, the Court should not compel arbitration for the named plaintiffs who agreed to arbitrate.

This argument is misguided. The Court is only concerned with deciding the issues before it presently, not the issues of hypothetical plaintiffs in a potential class action lawsuit. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct.

669, 38 L.Ed.2d 674 (1974). If other plaintiffs come forward who are not bound by an agreement to arbitrate, the Court will address such issue when ripe.

Moreover, class action allegations do not prevent the named plaintiffs from being forced to compel arbitration when such plaintiffs have agreed to arbitrate all of their disputes with the defendants. *Caudle v. American Arbitration Ass'n,* 230 F.3d 920 (7th Cir. 2000) ("A procedural device aggregating multiple persons' claims in litigation does not entitle anyone to be in litigation; a contract promising to arbitrate the dispute removes the person from those eligible to represent a class of litigants."); *see also Johnson v. West Suburban Bank,* 225 F.3d 366, 368 (3rd Cir. 2000) (holding that arbitration of plaintiff's statutory claims is required even where the arbitration clauses may prevent the bringing of class action lawsuits).

### G. Whether the Doctrine of Unconscionability is Useful in Determining the Validity of the Arbitration Clauses at Issue

Lastly, at oral argument on October 26, 2000, there was discussion of whether the arbitration clauses at issue are unconscionable contracts of adhesion. To prevail on this argument, the plaintiffs must show that the clauses are both procedurally and substantively unconscionable for the clauses to be deemed unenforceable. *Golden v. Mobil Oil Corp.,* 882 F.2d 490, 493 (11th Cir.1989). "Procedural unconscionability exists when the individualized circumstances surrounding the transaction reveal that there was no 'real and voluntary meeting of the minds' of the contracting parties. Substantive unconscionability exists when the terms of the contractual provision are unreasonable and unfair." *Id.* (citations omitted).



Plaintiffs' unconscionability argument must be summarily dismissed because the Court finds there is nothing substantively unconscionable with an arbitration clause *per se. Coleman v. Prudential Bache Securities, Inc.,* 802 F.2d 1350, 1351 (11th Cir.1986) ("[T]here is nothing inherently unfair or oppressive about arbitration clauses."). As discussed above, the Court intends to examine each arbitration clause to determine whether it is enforceable. The Court need not rule upon whether each arbitration clause is substantively unconscionable because an unfair or oppressive clause will not be enforceable under existing Supreme Court and Eleventh Circuit precedent governing arbitration clauses, irrespective of whether the clause is procedurally unconscionable.

With these threshold issues addressed, the Court now examines each of the defendants' motions to compel arbitration.

## II. Analysis Of Individual Arbitration Clauses To Determine Whether To Compel Arbitration In Provider Track Cases

### A. United

UnitedHealthcare, Inc. and UnitedHealth Group Incorporated f/k/a United HealthCare Corporation ("United") seek to compel arbitration of all claims raised by provider plaintiffs Manual Porth, M.D. and Glenn L. Kelly, M.D. With respect to Dr. Porth, the United Defendants proffer a United HealthCare of Florida Medical Group Participation Agreement between United HealthCare of Florida and

Community Orthopaedics and Pain Management, Inc.[9] The arbitration clause provides in relevant part that all matters arising from the agreement shall be arbitrated, but limits the arbitrator's authority by preventing the arbitrator from awarding extra contractual damages, including punitive or exemplary damages. Moreover, the arbitration agreement includes a one year statute of limitations to bring the claims in arbitration once there is written notice of the dispute.

The prohibition on extra contractual damages is precisely the type of arbitration agreement that was found unenforceable in *Paladino*. Such an arbitration agreement prevents Dr. Porth from obtaining any meaningful relief for his statutory claims. Additionally, the one year statute of limitations raises grave concerns that Dr. Porth's statutory claims will not be adjudicated appropriately in an arbitration forum. *Paladino*, 134 F.3d at 1058 (*citing Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir.1994)).

Accordingly, the Court will not compel arbitration of Dr. Porth's claims arising under RICO, ERISA, federal clean claim payment regulations, state prompt pay statutes, unjust enrichment, and state prompt pay statutes. However, the Court is not persuaded that the statute of limitations provision is a strong enough factor, on its own, to overcome the FAA's strong presumption in favor of arbitration. Thus, the Court will compel arbitration of Dr. Porth' breach of contract and *quantum meruit* claims, as these claims, if successful, would lead to contractual damages.

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[9] For the reasons discussed in Section I(D), Dr. Porth may not frustrate the agreement to arbitrate by claiming that he is a nonsignatory to the agreement. Dr. Porth's allegations "touch matters" relating to this arbitration agreement, and Dr. Porth is affiliated with Community Orthopaedics of Pain and Management, Inc. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346; *MS Dealer*, 177 F.3d at 947.



United moves to compel Dr. Kelly to arbitrate based upon a United HealthCare of Colorado, Inc. Physician Participation Agreement between United HealthCare of Colorado and Dr. Kelly.[10] The arbitration provision is identical to the United arbitration agreement discussed above concerning Dr. Porth, except that Dr. Kelly's arbitration clause only prevents the arbitrator from granting punitive or exemplary damages. The arbitrator may award extra contractual damages.

The Court finds that the limitation on punitive or exemplary damages serves as a limitation on the types of statutory claims that may be adjudicated before an arbitrator. *Paladino*, 134 F.3d at 1062 ("[T]he arbitrability of such claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies."). Dr. Kelly alleges RICO violations, which provide for treble damages. Treble damages are a form of punitive damages. *Gentry v. Resolution Trust Corp.*, 937 F.2d 899, 910-11 (3rd Cir.1991); *Pine Ridge Recycling, Inc. v. Butts County*, Georgia, 855 F.Supp. 1264, 1273 (M.D.Ga.1994); *cf. Shearson/American Express*, 482 U.S. at 240-41, 107 S.Ct. 2332 (indicating in dicta that treble damages are primarily remedial and secondarily punitive). The Court also finds that the one year statute of limitations serves the function of limiting the ability for Dr. Kelly to obtain meaningful relief in an arbitration forum for his other statutory claims. Thus, the Court shall only compel arbitration of Dr. Kelly's breach of contract and *quantum meruit* claims.

There is one final contention raised by United that must be addressed. In an effort to compel arbitration and dismiss

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[10] Dr. Kelly's allegations against United "touch matters" relating to this agreement. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346.

the instant action against Drs. Porth and Kelly, United has expressed a willingness to waive the arbitration clauses' limitations that prevent an arbitrator from awarding extra contractual damages and punitive or exemplary damages.[11] Principles of justice and fair play, however, lead to the conclusion that one party unilaterally cannot alter *post litem motam* terms of an agreement so that a case is dismissed. *Cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56-57, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995) ("[I]f the contract says 'no punitive damages,' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties – even if the effect of those intentions is to limit arbitration."). The Court rejects United's attempted waiver.

**B. Foundation**

Foundation Health Systems, Inc. ("Foundation") references four agreements that contain arbitration clauses in moving to compel plaintiff Dennis Breen, M.D. to arbitrate. Because three of the four agreements are enforceable, the Court shall compel Dr. Breen to advance all of his claims, except the conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies, in accordance with the parties' contracted arbitration agreement.

Foundation argues that an arbitration clause in the Sutter Agreement, entered into between Health Net and Sutter Independent Physicians as a Participating Medical

[11] No such waiver has been proffered concerning the statute of limitations provisions.



Group, requires that Dr. Breen's claims be arbitrated.[12] This agreement calls for arbitration of all grievances between the parties. Costs are split between the parties, unless assessed differently by an arbitrator. Fees are advanced by the initiating party.

The one potentially objectionable part of this agreement is the mandate that fees are advanced by the initiating party. The initiate fee mandate may result in the concern raised in *Paladino* and *Randolph* that hefty fees would prevent meaningful relief. This concern dissipates because there are two other enforceable arbitration clauses without a provision mandating that the fees be advanced by the initiating party. The Court intends to order arbitration under the other two agreements so that Dr. Breen is not required to advance the fees as the initiating party.

The two other agreements that contain an arbitration clause are: (1) Physicians Services Agreement between Health Net and Foundation Health Systems Affiliates and Dr. Breen, and (2) Champus/Tricare Prime and Extra Professional Provider Agreement between Foundation Health Systems Affiliates and Dr. Breen. The Physicians Services Agreement calls for arbitration of claims arising in tort, contract, or otherwise. The arbitration shall be governed by the California Arbitration Act. The Champus/Tricare Agreement states that any problems or

[12] For the reasons discussed in Section I(D), Dr. Breen may not frustrate the agreement to arbitrate by claiming that he is a nonsignatory to the agreement. Dr. Breen's allegations "touch matters" relating to this arbitration agreement, and Dr. Breen is affiliated with Sutter Independent Physicians. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346; *MS Dealer*, 177 F.3d at 947. Likewise, the Foundation Defendants are bound to this agreement to arbitrate due to their relationship with Health Net.

disputes relating to the agreement are to be arbitrated. The prevailing or substantially prevailing party's costs shall be borne by the other party.

Dr. Breen's allegations against Foundation are interrelated with the Physicians Services Agreement and the Champus/Tricare Agreement. Accordingly, the Court shall compel Dr. Breen to arbitrate all of his claims against Foundation, excluding conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies.

Lastly, for purposes of clarity to the future arbitrator, the Court finds unenforceable the fourth arbitration clause proffered by Foundation, located in the CHW Agreement between Foundation Health Systems Affiliates and CHW Medical Foundation as a Participating Medical Group. This arbitration agreement provides for a six month statute of limitations to bring arbitration, and divests the arbitrator of the ability to award punitive damages. For the various reasons addressed above, an arbitration clause with these limitations is unenforceable. Nonetheless, the Court will compel arbitration based upon the arbitration clauses found in the Physicians Services Agreement and the Champus/Tricare Agreement.

### C. WellPoint

WellPoint Health Networks Inc. ("WellPoint") seeks to compel arbitration of Dr. Breen's allegations against it based upon an arbitration agreement found in a Provider Agreement between Dr. Breen and WellPoint's subsidiary, Blue Cross of California. The arbitration clause provides first for a meet-and-confer process followed by arbitration. The clause governs any problems or disputes concerning the



agreement. The arbitration shall be governed by AAA, and there is no limitation on damages or the types of disputes that may be brought.

The Court finds nothing objectionable with this arbitration clause, in view of the Court's holdings in Section I. Dr. Breen's allegations against WellPoint arise from this agreement. There are no impediments that this Court is aware of that would prevent Dr. Breen from having all of his claims against WellPoint meaningfully resolved in an arbitration forum, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies.

### D. Prudential

Prudential Insurance Company of America ("Prudential") moves to compel arbitration of Dr. Porth's claims against it based upon a Participating Physician Agreement between Dr. Porth and Prudential Health Care Plan, Inc. and/or its affiliates. Dr. Porth opposes this motion on the ground that the arbitration mandate in this agreement is optional. An examination of this arbitration clause indicates that both parties should have proceeded differently in handling this dispute, but ultimately leads to the conclusion that Dr. Porth must follow the dispute resolution procedures agreed upon between the parties. For the reasons discussed below, Dr. Porth must mediate or arbitrate the allegations against Prudential presently before the Court, except for conspiracy and aiding and abetting allegations that stem from contractual relationships with other managed care companies.

Article IX of the Participating Physician Agreement, titled "Arbitration," contains three subsections. Section A

provides that the exclusive methods for resolving disputes concerning the parties' agreement are "negotiation, mediation, and/or arbitration." Section B, "Mediation," states that if a dispute arises and the parties cannot settle the dispute through negotiation, then either party may elect to submit the dispute to a sole mediator. If the parties cannot resolve the dispute within sixty days from the start of mediation, "either party may elect to submit the dispute to binding arbitration." Lastly, Section C, "Arbitration," provides the ground rules for arbitration, none of which lead to a finding that the arbitration clause is unenforceable.

Dr. Porth bases his argument that the arbitration clause is optional on the use of "and/or" language in Section A, as well as the preamble to Section C, which states "If the parties agree to binding arbitration...."

The Court finds that this agreement provides for three different forms of dispute resolution to be the exclusive means for resolving disputes concerning the agreement. The use of "and/or" language in Section A documents that these forms of dispute resolution are options; an aggrieved party is not required by this agreement to avail himself of all three options. Either party may initiate the dispute resolution procedures through negotiation, or both parties can agree at the onset to arbitration. In the present scenario, neither party has elected for negotiation (which would lead to the unilateral power to compel mediation and then arbitration), and both parties do not agree to binding arbitration. Analysis of how both parties chose to proceed is instructive in determining how to resolve Prudential's motion to compel arbitration.

There is no record evidence that suggests that once Dr. Porth filed the instant action, Prudential attempted to



avail itself of the dispute resolution procedures discussed above. Rather, Prudential unilaterally sought to compel arbitration, despite the fact that the arbitration clause requires both parties to agree to arbitrate. The only unilateral power Prudential possessed was to compel mediation after negotiation proved unsuccessful. A more prudent approach for Prudential, based upon the parties' agreement, would have been to initiate negotiation. While negotiation probably would have been futile, it would have given Prudential unilateral power to submit the dispute to mediation. If mediation proved unsuccessful after sixty days, then Prudential would have the unilateral power to force arbitration, as per the parties' agreement.

Likewise, Dr. Porth did not follow the parties' agreed upon dispute resolution procedures. Dr. Porth would have been able to seek redress for all of his claims, excluding the conspiracy and aiding and abetting allegations stemming from contractual relationships with other managed care companies, by following the agreed upon dispute resolution procedures. If negotiations proved futile, Dr. Porth could have unilaterally compelled mediation. If mediation was unsuccessful after sixty days, then Dr. Porth would have had the unilateral power to compel arbitration.

At bottom, both parties agreed to have the aforementioned dispute resolution procedures exclusively govern their disputes. Accordingly, the Court must honor this commitment. Dr. Porth is ordered to follow the agreed procedures to resolve the present dispute, excluding conspiracy and aiding and abetting allegations that stem from contractual relationships with other managed care companies, which this Court retains jurisdiction to hear. Dr. Porth is free to attempt to negotiate. If such negotiation is unsuccessful, Dr. Porth is free to compel mediation or

arbitration. Prudential already has consented to arbitration, but Dr. Porth has the option of mediation or arbitration--as the parties agreement only permits arbitration at this stage of the dispute resolution process by mutual agreement.

**E. CIGNA**

CIGNA Corporation, Connecticut General Corporation, and CIGNA Health Corporation ("CIGNA") move to compel both Drs. Porth and Kelly to arbitrate their disputes with CIGNA. Dr. Porth consented to arbitration in a Physician Managed Care Agreement between Dr. Porth and CIGNA HealthCare of Florida, Inc.[13] Section O(2) of the agreement states that "[a]rbitration shall be the exclusive remedy for the settlement of disputes arising under this Agreement." There is no language limiting the authority of the arbitrator to award damages; fees and costs shall be split between the parties, and AAA governs.

The Court finds that Dr. Porth has agreed to arbitrate the present dispute, and that the arbitration clause does not raise any concerns with respect to its enforceability. There is no reason for this Court to frustrate the parties' agreement. All of Dr. Porth's claims can be meaningfully adjudicated in an arbitration forum, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies, which the Court retains jurisdiction to hear.

With respect to Dr. Kelly, CIGNA proffers two agreements that allegedly contain arbitration clauses in moving to compel arbitration. CIGNA directs the Court's

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[13] Dr. Porth's allegations against CIGNA "touch matters" relating to this agreement. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346.



attention to a Physician Managed Care Agreement between Dr. Kelly and CIGNA HealthCare of Colorado, Inc., and a Specialist Physician Agreement between Dr. Kelly and CIGNA HealthCare of Colorado, Inc.[14]

The Physician Managed Care Agreement contains a dispute resolution section that states that all grievances and complaints between the parties shall be resolved in accordance with the dispute resolution procedures in the applicable Program Requirements. The Program Requirements mandate that the parties negotiate to resolve disputes. If negotiation fails, the parties are referred back to the Physician Managed Care Agreement, which does not give any direction as to how to proceed if negotiation does not resolve the dispute.

The Specialist Physician Agreement does not suffer from the same infirmity. Section G of this agreement states that any dispute that arises concerning this agreement shall be sent to arbitration. AAA governs, and each party pays half the costs of the proceeding.

Thus, the Court is faced with a scenario where the Physician Managed Care Agreement does not require arbitration, while the Specialist Physician Agreement requires arbitration. Accordingly, Dr. Kelley's claims that relate to the Specialist Physician Agreement shall be arbitrated, except for conspiracy and aiding and abetting allegations that stem from contractual relationships with other managed care companies. Dr. Kelly's claims that relate to the Physician Managed Care Agreement may proceed before this Court.

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[14] Dr. Kelly's allegations "touch matters" relating to these agreements. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346.

### F. PacifiCare

PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc. ("PacifiCare") seek to compel Dr. Breen to arbitrate his claims against PacifiCare, and bases its argument on two agreements: (1) Term Sheet between Sutter Health and PacifiCare of California, and (2) PMG Commercial Risk Agreement between Sutter Independent Physicians and PacifiCare of Florida. Dr. Breen counters by arguing that the Term Sheet does not apply to his claims against PacifiCare.

While the Court disagrees with Dr. Breen's contention, this issue is nondispositive of PacifiCare's motion to compel arbitration because the PMG Commercial Risk Agreement contains substantially the same language in its arbitration clause as the Term Sheet's arbitration clause.[15] As such, analysis of the PMG Commercial Risk Agreement will be dispositive of whether Dr. Breen's claims shall be arbitrated or litigated in front of the undersigned.

Both arbitration agreements contain broad language indicating that the parties intended for "any controversy, dispute, or claim arising out of the agreement" to be arbitrated. However, both agreements prohibit the arbitrator from awarding punitive damages. Thus, we are faced with a potential *Paladino* situation, discussed earlier within the context of United's motion to compel arbitration (Section

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[15] For the reasons discussed in Section I(D), Dr. Breen may not frustrate the agreement to arbitrate by claiming that he is a nonsignatory to the PMG Commercial Risk Agreement, or the Term Sheet for that matter. Dr. Porth's allegations "touch matters" relating to both of these arbitration agreements, and he is affiliated with Sutter Independent Physicians. *Mitsubishi*, 473 U.S. at 625 n. 13, 105 S.Ct. 3346; *MS Dealer*, 177 F.3d at 947.



II(A)), where the plaintiff may not be able to obtain meaningful relief for allegations of statutory violations in an arbitration forum. However, this agreement is distinguishable from the United scenario because the PacifiCare agreements do not impose a shortened statute of limitations.

Accordingly, the Court will not compel Dr. Breen to arbitrate his RICO claims against PacifiCare due to the arbitrator's inability to impose punitive (treble) damages. All other statutory and non-statutory claims shall be arbitrated, except for the conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies.

## III. Analysis Of Individual Arbitration Clause To Determine Whether To Compel Arbitration In Subscriber Track Case Involving PacifiCare

PacifiCare Health Systems, Inc. ("PacifiCare") also moves to compel subscriber track plaintiff Debbie Hitsman to arbitrate her claims raised in the instant litigation. PacifiCare bases its argument on an arbitration clause in a Master Group Service Agreement between MCI-WorldCom, Inc. ("MCI") and PacifiCare- Oklahoma. Plaintiff Hitsman, as an MCI employee, became bound by the terms of the agreement when she enrolled in PacifiCare HMO.

The dispute resolution process in the Master Group Service Agreement provides in § 7.01 that a dispute "relating to the performance of this Agreement by PacifiCare and Member" shall first be submitted to an internal dispute resolution process to resolve the dispute in a non-adjudicative setting. § 7.02 provides that any dispute that is not resolved through the dispute resolution process described

in § 7.01 "shall have the matter resolved by binding arbitration by a single arbitrator." JAMS/Endispute shall arbitrate, and its rules shall govern. The fees and expenses of the arbitrator and neutral administrator shall be divided equally among the disputants. Oklahoma law governs, and the Federal Arbitration Act also applies.

Plaintiff Hitsman raises various defenses to enforcement of the arbitration clause: (1) the arbitration clause is invalid under Oklahoma law, (2) the present dispute is beyond the scope of the arbitration clause, (3) ERISA claims are not subject to arbitration, and (4) the clause is unenforceable under *Randolph* and *Paladino*. For the reasons discussed in Sections I(B) and I(E) above, the ERISA and *Randolph* and *Paladino* arguments are rejected.

With respect to the issue of invalidity under Oklahoma law, the Court rejects that argument as well. Plaintiffs rely upon *Cannon v. Lane*, 867 P.2d 1235 (Okla.1993), where the Oklahoma Supreme Court invalidated an arbitration clause in an HMO contract because it was a contract with reference to insurance. Oklahoma law does not permit arbitration of claims between an insurer and the insured, "except where both the insured and insurer are insurance companies." 15 Okla. Stat. §§ 801-18.

In *Cannon*, a state employee sued PacifiCare of Oklahoma for failure to certify him for hemorrhoid surgery. The court relied upon the Oklahoma statute, as well as the common law policy that "agreements to submit future controversies to arbitration are contrary to public policy[,]" in refusing to enforce the arbitration clause. *Id.* at 1238.

The instant action is distinguishable from *Cannon*. That case dealt with Oklahoma state law issues, while this



case deals with federal claims pursuant to the FAA. The Supreme Court has addresses this issue squarely in *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). In *Perry*, the Court distinguished state laws that concern the validity, revocability, and enforceability of contracts generally, and state laws that take their meaning precisely from the fact that a contract to arbitrate is at issue. The FAA must defer to the former, but preempts the latter. *Id.* at 491, 107 S.Ct. 2520 ("This clear federal policy places § 2 of the [FAA] in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way."). For example, a federal court would apply state law regarding duress and inducement in determining the validity of an arbitration clause because it concerns the validity and enforceability of the contract; however, the court would not concern itself with a state law that invalidates a specific class of cases, such as stock fraud or insurance claims. *Id.* at 489, 107 S.Ct. 2520. Accordingly, the Oklahoma statute that prevents arbitration of insurance claims is of no assistance to Ms. Hitsman in the instant action.

Plaintiff's remaining argument, that the dispute is beyond the scope of the arbitration clause, is also rejected. Plaintiff argues, by focusing on the language of § 7.01, that the arbitration clause is limited to the denial of claims relating to the performance of the agreement. § 7.02 only mandates arbitration for disputes "not resolved by the above appeals and dispute resolution processes...." Plaintiff posits that her allegations concerning systemic violations by PacifiCare (that speak to violations of RICO and ERISA) are not covered by the arbitration clause. PacifiCare counters by

highlighting the preamble of § 7.02, "Any claim, controversy, dispute or disagreement...."

The difficulty with Plaintiff's argument is two-fold. First, this Court is not persuaded that the arbitration clause at issue is limited only to denial of claims, particularly in view of the broad, all-encompassing preamble of § 7.02. Second, and perhaps more importantly, the FAA has a presumption in favor of arbitration, as propounded by the Supreme Court. *Moses H. Cone Memo. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). This Court is required to resolve any doubt "concerning the scope of arbitrable issues ... in favor of arbitration...." *Id.* at 24-25, 103 S.Ct. 927. Accordingly, this argument is rejected as well.

The parties entered into a valid arbitration agreement to resolve all disputes concerning the Master Group Service Agreement. Plaintiff must have all of her claims against PacifiCare resolved through arbitration.

## CONCLUSION

Therefore, it is

ADJUDGED that PacifiCare's Motion to Compel Arbitration of Subscriber Track Plaintiff Debbie Hitsman's claims (D.E. No. 76), filed on July 14, 2000, is GRANTED. All of Ms. Hitsman's claims against PacfiCare shall be arbitrated. It is also

ADJUDGED that PacifiCare's Motion to Compel Arbitration of Provider Track Plaintiff Dennis Breen, M.D.'s claims against PacifiCare (D.E. No. 257), filed on September 8, 2000, is GRANTED in part and DENIED in



part. All of Dr. Breen's claims against PacfiCare shall be arbitrated, except for (1) RICO claims and (2) conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies. It is also

ADJUDGED that Prudential's Motion to Compel Arbitration of Provider Track Plaintiff Manual Porth, M.D.'s claims against Prudential (D.E. No. 313), filed on September 22, 2000, is GRANTED in part and DENIED in part. All of Dr. Porth's claims against Prudential shall be arbitrated, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies. It is also

ADJUDGED that Foundation's Motion to Compel Arbitration of Provider Track Plaintiff Dennis Breen, M.D.'s claims against Foundation (D.E. No. 314), filed on September 22, 2000, is GRANTED in part and DENIED in part. All of Dr. Breen's claims against Foundation shall be arbitrated, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies. It is also

ADJUDGED that United's Motion to Compel Arbitration of Provider Track Plaintiffs Manual Porth, M.D.'s and Glen L. Kelly, M.D.'s claims against United (D.E. No. 319), filed on September 22, 2000, is GRANTED in part and DENIED in part. The only claims that shall be arbitrated are Dr. Porth's and Dr. Kelly's claims concerning breach of contract and quantum meruit. All other claims shall be litigated before the undersigned. It is also

ADJUDGED that CIGNA's Motion to Compel Arbitration of Provider Track Plaintiffs Manual Porth, M.D.'s and Glen L. Kelly, M.D.'s claims against CIGNA

(D.E. No. 323), filed on September 26, 2000, is GRANTED in part and DENIED in part. All of Dr. Porth's claims against CIGNA shall be arbitrated, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies. All of Dr. Kelly's claims against CIGNA stemming from the Specialist Physician Agreement shall be arbitrated, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies. However, all of Dr. Kelly's claims against CIGNA stemming from the Physician Managed Care Agreement shall be litigated before the undersigned. It is also

ADJUDGED that WellPoint's Motion to Compel Arbitration of Provider Track Plaintiff Dennis Breen, M.D.'s claims against WellPoint (D.E. No. 457), filed on October 25, 2000, is GRANTED in part and DENIED in part. All of Dr. Breen's claims against WellPoint shall be arbitrated, except for conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of December, 2000.



United States District Court
Southern District of Florida
Miami Division

In re: MANAGED CARE LITIGATION
This Document Relates to Provider Track Cases

No. MDL 1334
No. 00-1334-MD

Filed April 26, 2001

**ORDER GRANTING IN PART PACIFICARE'S MOTION TO COMPEL, AND ORDER MODIFYING PRIOR ARBITRATION ORDER CONCERNING FOUNDATION'S MOTION TO COMPEL**

MORENO, District Judge.

THIS MATTER came before the Court upon Defendants PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc.'s ("PacifiCare's") Contingent Supplemental Motion to Compel Arbitration (D.E. No. 888), filed on January 26, 2001.

THE COURT has considered the motion, responses, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the motion is GRANTED in part for the reasons addressed below. It is also

ADJUDGED that the Court's prior arbitration order ("Order") dated December 11, 2000 is MODIFIED with

respect to Foundation's motion to compel arbitration for the reasons addressed below.

In its prior Order, the Court ruled that Dr. Breen's claims against PacifiCare that stem from Dr. Breen's affiliation with Sutter Health through Sutter Independent Physicians (the "Sutter Agreement (PacifiCare)") are to be arbitrated, except for Dr. Breen's RICO claims, as well as his aiding and abetting and conspiracy claims that stem from contractual relationships with other managed care companies. The RICO claims were deemed non-arbitrable because the Sutter Agreement (PacifiCare) prevented the arbitrator from awarding punitive (treble) damages. PacifiCare now has filed a "Contingent Supplement Motion to Compel Arbitration" based upon Dr. Breen's affiliation with Mercy Medical Foundation through Golden State Physicians (the "Mercy Agreement"), as well as for other reasons addressed in Part II.

## I. ARBITRATION OF DR. BREEN'S CLAIMS AGAINST PACIFICARE UNDER MERCY AGREEMENT, AND MODIFICATION OF ORDER CONCERNING FOUNDATION'S MOTION TO COMPEL ARBITRATION

Similar to the Sutter Agreement (PacifiCare), the Mercy Agreement contains an arbitration clause as the means for resolving disputes stemming from that agreement. (Mercy Agreement, § 6.2 (stating that "any dispute or claim between the parties arising out of the interpretation of or performance under the [Mercy] Agreement" shall be arbitrated.)). However, the Mercy Agreement's arbitration clause does not prevent an arbitrator from awarding punitive damages. Thus, PacifiCare moves the Court to compel



Dr. Breen to arbitrate all claims arising out of the Mercy Agreement.[16]

The Court now is presented with a situation where the litigants have entered into two different contracts that contain inconsistent arbitration agreements. The Court was faced with precisely the same scenario in its prior Order with respect to Dr. Kelly's claims against CIGNA, as well as a somewhat similar scenario concerning Dr. Breen and Foundation. After reviewing its prior Order, it appears that the Court did not resolve these two matters consistently. With CIGNA there was a Specialist Physician Agreement ("Specialist Agreement") and a Physician Managed Care Agreement ("Physician Agreement"). The Specialist Agreement mandated arbitration for the majority of Dr. Kelly's claims, while the Physician Agreement did not mandate arbitration. The Court ruled that Dr. Kelly's claims that stem from the Specialist Agreement shall be arbitrated, while his claims that stem from the Physician Agreement shall be litigated before the undersigned.

However, with Foundation and Dr. Breen the Court analyzed four agreements between the litigants: (1) Sutter Agreement between Health Net and Sutter Independent Physicians as a Participating Medical Group ("Sutter Agreement (Foundation)"), (2) Physicians Services Agreement between Health Net and Foundation Health Systems Affiliates and Dr. Breen ("Physicians Services Agreement"), (3) Champus/Tricare Prime and Extra Professional Provider Agreement between Foundation Health Systems Affiliates and Dr. Breen ("Champus/Tricare Agreement"), and (4) CHW Agreement between Foundation

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[16] Except as modified by this Order, the Court incorporates by reference its prior arbitration Order.

Health Systems Affiliates and CHW Medical Foundation as a Participating Medical Group ("CHW Agreement"). The Court expressed concern regarding the provision in the Sutter Agreement (Foundation) that required Dr. Breen to advance the arbitration fees as the initiating party, in view of the Eleventh Circuit's concern that steep filing fees and costs could prevent meaningful relief through arbitration. *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149 (11th Cir.1999) *rev'd in part Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). The Court found the arbitration clauses in the Physicians Services Agreement and the Champus/Tricare Agreement to be enforceable and compelled arbitration for all of Dr. Breen's claims, except for aiding and abetting and conspiracy claims that stem from contractual relationships with other managed care companies. The Court did not compel arbitration based upon the Sutter Agreement (Foundation), nor on the CHW Agreement that contained a provision prohibiting the arbitrator from awarding punitive damages and a six month statute of limitations to institute arbitration. But the Court did not, at that time, retain jurisdiction over Dr. Breen's claims that stemmed from the Sutter Agreement (Foundation) and CHW Agreement.

After review of its prior Order and the parties' pleadings concerning PacifiCare's present motion to compel, the Court finds that the approach taken with respect to Dr. Kelly's claims against CIGNA is the correct way to handle instances where the litigants have multiple agreements with inconsistent arbitration clauses. It is axiomatic that parties should only be compelled to arbitrate disputes that the parties have agreed to arbitrate. *E.g.*, *AT & T Tech. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 ("[A]rbitration is a matter of contract and a



party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.") (citation omitted); *Morewitz v. West of England*, 62 F.3d 1356, 1365 (11th Cir.1995) (expressing reluctant to mandate arbitration where the parties did not bargain to do so); *Goldberg v. Bear Stearns & Co.*, 912 F.2d 1418, 1419 (11th Cir.1990) (holding that parties will not be required to arbitrate disputes that they have not agreed to arbitrate, despite federal presumption in favor of arbitration).

Accordingly, Dr. Breen's claims against PacifiCare that stem from the Mercy Agreement, including RICO claims, shall be arbitrated. However, Dr. Breen's RICO claims against PacifiCare that stem from the Sutter Agreement (PacifiCare) shall be litigated before the undersigned, as ruled upon in the Court's prior Order, because the arbitrator may not award punitive damages under that arbitration agreement. This holding has no impact on the Court's prior ruling that aiding and abetting and conspiracy claims lodged against PacifiCare that stem from contractual relationships with other managed care companies are to be litigated before the undersigned.

In view of the Court's holding today, the Court now must modify its prior Order with respect to Foundation's motion to compel arbitration. As discussed above, the Court compelled Dr. Breen to arbitrate all of his claims against Foundation based upon two arbitration agreements. The Court now must analyze the other two arbitration agreements to determine whether to compel arbitration of Dr. Breen's claims that stem from the Sutter Agreement (Foundation) and CHW Agreement.

In view of the Supreme Court's holding in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000), the Court's

concern regarding the Sutter Agreement (Foundation)'s requirement that Dr. Breen advance the arbitration costs as the initiating party is diminished. Thus, the Court shall compel Dr. Breen to arbitrate all claims that stem from the Sutter Agreement (Foundation). However, the concerns raised in its prior Order regarding the CHW Agreement prevent the Court from compelling arbitration of Dr. Breen's RICO claims that stem from this agreement. As such, the Court will retain jurisdiction to hear Dr. Breen's RICO claims that stem from the CHW Agreement due to the arbitrator's inability to award punitive (treble) damages. All of Dr. Breen's other claims stemming from this agreement shall be arbitrated. This ruling likewise has no impact on the Court's prior holding that aiding and abetting and conspiracy claims lodged against Foundation that stem from contractual relationships with other managed care companies are to be litigated before the undersigned.

## II. WHETHER TO COMPEL ARBITRATION OF DRS. BURGESS, KELLY, BOOK, AND DAVIS' CLAIMS AGAINST PACIFICARE

PacifiCare also files the instant motion to compel arbitration with respect to Drs. Burgess, Kelly, Book, and Davis' claims against PacifiCare. PacifiCare has reviewed its records and now proffers agreements between these doctors and PacifiCare that contain arbitration clauses. As such, any claims lodged against PacifiCare by these doctors that stem from the parties' agreements should be arbitrated. However, a careful review of the Provider Plaintiffs' Consolidated, Amended Complaint (the "Complaint") indicates that, with one exception, none of these doctors have lodged any claims against PacifiCare that stem from the parties' agreements. Rather, these doctors only allegations against PacifiCare concern aiding and abetting and conspiracy claims that stem



from contractual relationships with other managed care companies. Thus, the Court finds no justification to compel arbitration between these doctors and PacifiCare based upon the parties' agreements, which are not at issue in the instant lawsuit.

However, Dr. Book alleges in the Complaint a contractual relationship with PacifiCare, and PacifiCare proffers the parties' Southwest Florida Agreement, which contains an arbitration clause, to support its motion to compel arbitration. This agreement prevents an arbitrator from awarding punitive (treble) damages. Thus, the Court finds this agreement quite similar to the agreement discussed above between PacifiCare and Sutter Health involving Dr. Breen. Accordingly, the Court shall compel arbitration of all of Dr. Book's claims against PacifiCare, except for RICO claims and aiding and abetting and conspiracy claims that stem from contractual relationships with other managed care companies.

Lastly, as is apparent from the Court's rulings today, the Court declines PacifiCare's invitation to revisit the issue of whether the Court should compel arbitration of aiding and abetting and conspiracy allegations that stem from contractual relationships with other managed care companies. These claims shall be litigated before the undersigned, as there is no arbitration agreement between the parties concerning these types of claims and the justification for invoking the doctrine of equitable estoppel is not present here. Moreover, the Court will not stay this lawsuit pending appellate review of a portion of its prior Order or the resolution of any arbitrations that either are occurring presently or may occur in the future.

## III. CONCLUSION

In sum, Dr. Breen's claims against PacifiCare that stem from the Mercy Agreement shall be arbitrated, including RICO claims. The prior arbitration Order is modified so that Dr. Breen's claims against Foundation that stem from the Sutter Agreement (Foundation) shall be arbitrated, but the Court retains jurisdiction to hear Dr. Breen's RICO claims against Foundation that stem from the CHW Agreement. Dr. Book's claims against PacifiCare, except RICO claims and aiding and abetting claims that stem from contractual relationships with other managed care companies, shall be arbitrated. Today's ruling does not impact the Court's prior holding that aiding and abetting and conspiracy claims that stem from contractual relationships with other managed care companies shall be litigated before the undersigned. There shall be no stay of this multi-district litigation while certain defendants appeal the Court's ruling concerning partial denial of motions to compel certain plaintiffs to arbitrate their allegations lodged against them, nor shall there be a stay while certain defendants arbitrate a portion of certain plaintiffs' allegations.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of April, 2001.



UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-10247-CC & 01-12596-CC

In re: HUMANA INC. MANAGED CARE LITIGATION

Price Plaintiffs, Price, Sessa, Katz & Yingling, Sandra Johnson, Patricia Freyre, Regina Joi Price, Anthony Sessa, Arnold Katz, et al.,
Plaintiffs-Appellees,

v.

Humana Insurance Company, Coventry Health Care of Georgia, Inc., f.k.a. Principal Health Care of Georgia, Inc., Principal Health Care, Inc., et al.,
Defendants,

PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., United Health Care, United Health Group, Foundation Health Systems, Inc., Wellpoint Health Networks, Inc., Prudential Insurance Company of America,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida.

Filed June 21, 2002

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BARKETT, FAY and WINTER,* Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rule of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

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* Honorable Ralph K. Winter, U.S. Circuit Judge for the Second Circuit, sitting by designation.



## FEDERAL STATUTES INVOLVED IN THIS CASE

**9 U.S.C. §2. Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

**9 U.S.C. §4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination**

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the

parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

**18 U.S.C. §1964. Civil remedies**

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the



enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

**ARBITRATION AGREEMENTS BINDING BREEN AND PACIFICARE REFERENCED IN 132 F. SUPP.2D 989.**

Arbitration. Any controversy, dispute or claim arising out of this Agreement which is not resolved pursuant to the Provider Dispute Resolution Procedure specified above shall be resolved by binding arbitration at the request of either Party, in accordance with the Commercial Rules of the American Arbitration Association. Such arbitration shall occur in Sacramento, California, unless the Parties mutually agree to have such proceeding in some other locale. The arbitrator shall apply California substantive law and federal substantive law where state law is preempted. Civil discovery for use in such arbitration may be conducted in accordance with the provisions of California law, and the arbitrator selected shall have the power to enforce the rights, remedies, duties, liabilities and obligations of discovery by the imposition of the same terms, conditions and penalties as can be imposed in like circumstances in a civil action by a court of competent jurisdiction of the State of California. California Civil Code Section 1283.05, the provisions of California law concerning the right to discovery and the use of depositions in arbitration are incorporated herein by reference and made applicable to this Agreement.

The arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by California law, except that punitive damages shall not be awarded. The arbitrator shall prepare a decision in writing.

Notwithstanding the above, in the event either Medical Group or PacifiCare wishes to obtain injunctive relief or a temporary restraining order, such Party may initiate an action for such relief in a court of general jurisdiction in the State of



California. The decision of the court with respect to the requested injunctive relief or temporary restraining order shall be subject to appeal only as allowed under California law. However, the courts shall not have the authority to review or grant any request or demand for damages.

S.D.Fla. Docket #1000, Ex. A, at pp. 12-13 & Ex. B, at p. 20 (included in 11th Circuit Excerpts of Record for Appeal No. 01-10247-CC).

**ARBITRATION AGREEMENT BINDING BOOK AND PACIFICARE REFERENCED IN 143 F. SUPP.2D 1371.**

**10.03 ARBITRATION** – Any controversy or claim arising out of, or relating to, this Agreement, or the breach thereof, or with respect to any of the documents executed in conjunction herewith, that cannot be resolved through the PacifiCare Provider Grievance Process as spelled out in the PacifiCare Provider Policy and Procedure Manual or that cannot be resolved using the state of Florida's Benefit and Payment Policy, shall be settled by Arbitration in accordance with the commercial rules of the American Arbitration Association. Such arbitration shall occur in Lee County, Florida, unless the parties mutually agree to have such proceeding in some other locale. Civil discovery shall be permitted under the term [sic] of Florida law.

Upon submission of a dispute to the American Arbitration Association, PacifiCare and PHYSICIAN agree to be bound by the rules of procedure and decision of the American Arbitration Association. The arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by Florida law, but shall not have the power to award punitive damages. The arbitrator shall prepare in writing and provide the parties an

award including factual findings and the legal basis and other reasons on which the award is based. The arbitrator shall not have the power to commit errors of law or legal reasoning. Judgment upon the award rendered may be entered in any court having jurisdiction thereof.

S.D.Fla. Docket #1075, Leal Dec. Ex. A, at p. 20 (included in 11th Circuit Excerpts of Record for Appeal No. 01-12596-CC).

**ARBITRATION AGREEMENT BINDING KELLY AND UNITED REFERENCED IN 132 F. SUPP.2D 989.**

Plan or Payor and Physician will work together in good faith to resolve any disputes about their business relationship. If the parties are unable to resolve the dispute within 30 days following the date one party sent written notice of the dispute to the other party, and if Plan, Physician, or any Payor that has consented in writing to binding arbitration wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association. In no event may arbitration be initiated more than one year following the sending of written notice of the dispute. Any arbitration proceeding under this Agreement shall be conducted in Arapahoe County, Colorado. The arbitrators may construe or interpret but shall not vary or ignore the terms of this Agreement, shall have no authority to award any punitive or exemplary damages, and shall be bound by controlling law. If the dispute pertains to a matter which is generally administered by certain Plan procedures, such as credentialing or quality improvement plan, the procedures set forth in that plan must be fully exhausted by Physician before Physician may invoke his or her right to arbitration under this section. The parties acknowledge that because



this Agreement affects interstate commerce the Federal Arbitration Act applies.

S.D.Fla. Docket #321, Ex. C, at §8 (included in 11th Circuit Excerpts of Record for Appeal No. 01-10247-CC).

**ARBITRATION AGREEMENT BINDING PORTH AND UNITED REFERENCED IN 132 F. SUPP.2D 989.**

The parties shall work together in good faith to resolve any disputes about their business relationship. If the parties are unable to resolve the dispute within 30 days following the date one party sent written notice of the dispute to the other party, and if either party wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association. In no event may arbitration be initiated more than one year following the sending of written notice of the dispute. Any arbitration proceeding under this Agreement shall be conducted in Dade County, Florida. The arbitrators may construe or interpret but shall not vary or ignore the terms of this Agreement, shall have no authority to award extracontractual damages of any kind, including punitive or exemplary damages, and shall be bound by controlling law. If the dispute pertains to a matter which is generally administered by certain Plan procedures, such as credentialing or quality improvement plan, the procedures set forth in that plan must be fully exhausted by Medical Group before Medical Group may invoke its right to arbitration under this section. The parties acknowledge that because this Agreement affected interstate commerce the Federal Arbitration Act applies.

S.D.Fla. Docket #321, Ex. A, at §8 (included in 11th Circuit Excerpts of Record for Appeal No. 01-10247-CC).

No. 02-215

Supreme Court, U.S.
FILED
SEP 12 2002
OFFICE OF THE CLERK

# In The Supreme Court of the United States

IN RE HUMANA INC. MANAGED CARE LITIGATION

PACIFICARE HEALTH SYSTEMS, INC., et al.,

*Petitioners,*

v.

JEFFREY BOOK, D.O., et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

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## QUESTION PRESENTED FOR REVIEW

Whether federal courts or arbitrators should decide if arbitration agreements that preclude pursuit of federal statutory rights are enforceable under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*?

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## STATEMENT OF THE CASE

Respondents are physicians from California, Colorado, Florida, Kentucky and Texas who have been victimized by automated claims processing schemes developed and deployed by Petitioners and other managed care companies to deprive them of payment for rendering covered, medically necessary services to their insureds.

This case began when cases filed by Respondents throughout the country were transferred to the Southern District of Florida by the Federal Judicial Panel on Multi-District Litigation. On August 14, 2000, in response to the district court's scheduling order, Respondents joined in the filing of an amended complaint on behalf of themselves and others similarly situated against Petitioners and other companies seeking relief, *inter alia*, under Section 1964(c) of the Racketeer Influenced and Correct Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, for violations of 18 U.S.C. § 1962(a) and (c) thereof, for conspiracy to violate 18 U.S.C. § 1962(a) and (c) in violation of 18 U.S.C. § 1962(d), for aiding and abetting violations of 18 U.S.C. § 1962(a) and (c) in violation of 18 U.S.C. § 2, and for breach of contract, quantum meruit and unjust enrichment.

Most of the managed care company defendants, including Petitioners, filed motions to compel arbitration pursuant to 9 U.S.C. § 4 of the Federal Arbitration Act based upon arbitration clauses contained in various contracts with Respondents. On December 11, 2000, the district court entered its Order Granting in Part and Denying in Part Various Defendants' Motion to Compel Arbitration, 132 F. Supp. 2d 989, Petitioners' App. 11, making the following rulings on the pending arbitration

issues: that claims for breach of contract, quantum meruit and unjust enrichment arising out of the treatment of patients pursuant to contracts with arbitration clauses were arbitrable (Petitioners' App. 29-44); that Respondents' RICO conspiracy and aiding and abetting claims against defendants with whom they had no arbitration agreements, or which stemmed from contractual relationships with other managed care companies, were not arbitrable (Petitioners' App., 16-20, 29-44); that, with the exception of the claims against Petitioners, Respondents' direct RICO claims for violations of 18 U.S.C. § 1962(a) and (c) were arbitrable (Petitioners' App. 22-24, 29-44); and that, with respect to direct RICO claims asserted against Petitioners, provisions in their arbitration agreements limiting the power of the arbitrators to award punitive damages, and in the case of some of the United Petitioners' contracts, extra-contractual damages as well, prevented Respondents from obtaining meaningful statutory relief in arbitration and rendered those arbitration clauses unenforceable. (Petitioners' App. 22-24, 29-31, 40-41).

It is the last ruling, along with an identical ruling made by the district court in an April 26, 2001 order on a subsequent motion to compel arbitration filed by the PacifiCare Petitioners, 143 F. Supp. 2d 1371, 1374; Petitioners' App. 47, 51, that forms the basis of the Petition for Writ of Certiorari. Petitioners did not, however, argue in the district court that arbitrators rather than the court should make this decision.

Petitioners appealed both of the district court's arbitration orders to the Eleventh Circuit Court of Appeals, which consolidated the two appeals, nos. 01-10247 and 01-12596, for argument and decision. As was the case in the



district court, Petitioners did not argue in appeal no. 01-10247 that arbitrators rather than courts should decide whether their arbitration clauses precluded pursuit of federal statutory remedies so as to render them unenforceable under the Federal Arbitration Act. In appeal no. 01-12596, the PacifiCare Petitioners raised the issue for the first time in their reply brief.

The Court of Appeals affirmed the district court, confining its opinion to broader and more hotly contested issues. Of relevance to the question Petitioners now present, the Court of Appeals stated only:

> The district court made four rulings related to this appeal. . . . Second, relying primarily on our opinion in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F. 3d 1054 (11th Cir. 1998), the court found that those arbitration clauses that exclude punitive damages are unenforceable in this suit because they preclude recovery of treble damages under RICO; therefore, an HMO may not compel arbitration of a RICO suit under such an arbitration clause.
>
> * * *
>
> We affirm in its entirety the district court's order for the reasons set forth in its comprehensive opinion found at 132 F. Supp. 989 (S.D. Fla. 2002).

285 F. 3d at 973-944; Petitioners' App. 3-4.

## REASONS FOR DENYING THE PETITION

### A. The Question Petitioners Present For Review Was Neither Raised Nor Resolved Below

In reasons A and B for granting the petition, Petitioners identify two levels of conflict they perceive among the Circuit Courts of Appeals on the issue of whether the district court or the arbitrator should decide whether a plaintiff can be compelled to arbitrate federal statutory claims under an arbitration clause that does not permit vindication of the rights afforded by the statute. In reason D, Petitioners identify several policy reasons they believe militate for review of the same question, and add a sub-question – whether the district court or the arbitrator should decide exactly what effect the arbitration clause has on the pursuit of federal statutory rights. And in reason E, Petitioners suggest that the petition should be granted because the Court is poised to resolve what they dub a parallel "who should decide" question in the context of the National Association of Securities Dealers ("NASD") Code of Arbitration Procedure.

However, the who should decide question at the heart of each of these reasons for granting the petition was never properly before the courts below, and was neither addressed nor resolved by them. Despite the fact that the conflict envisioned by Petitioners in reason B dates back to at least 1997, and that the conflict the Court has decided to resolve in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, goes back even further, Petitioners never argued in the district court that an arbitrator, as opposed to the court, should decide whether plaintiffs could be compelled to arbitrate their RICO claims. To the contrary, Petitioners urged the district court to decide the question on its merits, and the district court did, never considering the



procedural question Petitioners now present. (Petitioners' App. 22-24, 29-32, 40-41).

In the Circuit Court of Appeals, in case no. 01-10247, Petitioners again failed to raise the issue, arguing instead that the district court's decision not to compel arbitration of plaintiffs' RICO claims was wrong on the merits. In subsequent appeal no. 01-12596, which was consolidated for argument and decision, Petitioners also failed to raise the question they now present in their initial briefs. It was raised for the first time, and then only by the PacifiCare Petitioners, in their reply brief. But issues raised for the first time in a reply brief are not properly before the Court of Appeals, *e.g., Fogade v. ENB Revocable Trust*, 263 F. 3d 1274, 1296 n.19 (11th Cir. 2001); *Hartsfield v. Lemacks*, 50 F. 3d 950, 953 (11th Cir. 1995), and the who should decide question they now present was neither addressed nor resolved in the Eleventh Circuit's decision. (Petitioners' App. 1-10).

Thus, whatever merit Petitioners' reasons for granting the writ may have, which, as set forth below, is precious little, this case is not an appropriate vehicle for review of the question presented. *E.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court"); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.").

## B. The Court Has Already Decided The Question Presented

Although Petitioners cast a wider net in search of conflict, this Court has already decided the only question that, if raised, could have been presented by the decision below, i.e., whether, when considering a motion to compel arbitration of a federal statutory claim pursuant to 9 U.S.C. § 4 of the Federal Arbitration Act, courts should determine if the arbitration clause at issue prevents the plaintiff from pursuing his or her statutory rights and remedies so as to render the clause void or unenforceable.

The Court first considered the arbitrability of federal statutory claims in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), where the claim at issue was one for treble damages based on anti-trust violations. Based on the premise that, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute," the Court held that federal statutory claims could, as a general proposition, be arbitrated. The Court went on to caution, however, that this would not always be the case, and that courts had to determine whether the statute at issue evinced an intention on the part of Congress to override the policy manifested in the Federal Arbitration Act so as to ren ler an agreement to arbitrate claims thereunder unenforceable:

> That is not to say that all controversies implicating statutory rights are suitable for arbitration. . . . Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by the Act, it is congressional intention expressed in some other



> statute on which *courts* must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. . . . Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

*Id.* at 627-628. (citations omitted) (emphasis added).

Speaking even more directly to the question presented, the Court decided the enforceability question itself rather than refer it to arbitrators, and sanctioned the two-step inquiry used by the Court of Appeals to make the same decision:

> In sum, the Court of Appeals correctly conducted a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims.

*Id.* at 627-628. (citations omitted).

This, of course, is the same analysis that was conducted below. Having decided that the parties' arbitration clauses were broad enough to reach certain of Respondents' RICO claims against Petitioners, the determination was then made that "legal constraints external to the parties' agreement," i.e., congressional policy as reflected in RICO, rendered the arbitration clauses unenforceable because they precluded vindication of plaintiffs' statutory rights under RICO. (Petitioners' App. 22-24, 29-31, 40-41).

The Court continued to flesh out the role courts are to play in making this decision in subsequent cases. For

example, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court explained how *courts* should determine whether congressional intent overrides an arbitration agreement in a particular context:

> The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes.

*Id.* at 226-227. (citations omitted).

And in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), contrary to Petitioners' admonition in reasons D(2) and (3) for granting the petition that this is a job for arbitrators rather than courts, the Court analyzed the barriers to relief contained in the arbitration clauses at issue to determine whether they sufficiently thwarted pursuit of federal statutory remedies to warrant a determination under the third prong of the test announced in *McMahon* that arbitration would frustrate Congress' intent in enacting the statute. As the Court stated in *Green Tree* in confirming both the procedure followed below and the need to analyze such barriers:



> In determining whether statutory claims may be arbitrated, we first ask whether the parties agreed to submit their claims to arbitration, and then whether Congress has evinced an intention to preclude waiver of judicial remedies for the statutory rights at issue.
>
> * * *
>
> It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating his federal statutory rights in the arbitral forum.

531 U.S. at 90.[1]

In short, the who should decide question embedded in the decision below – whether the court or an arbitrator should determine if congressional intent to override the

---

[1] Petitioners' suggestion in reason D(1) for granting the petition that congressional intent to preclude waiver of federal statutory rights can only be gleaned from express statutory language either ignores, or asks the Court to abandon, the third prong of the test for congressional intent enunciated in *McMahon* and applied in *Gilmer* and *Green Tree*, i.e.. that congressional intent to limit or prohibit waiver can be discerned, *inter alia* from "an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227. The only decisions Petitioners cite for this proposition, *United States v. Mezzanatto*, 513 U.S. 196 (1995), and *Metro East Center for Conditioning and Health v. Qwest Communications Int'l, Inc.*, 294 F. 3d 924 (7th Cir 2002), involve neither the waiver of federal statutory rights nor the issue of how congressional intent to preclude such waiver is to be determined. Both merely recited the general proposition that federal statutory rights are waivable absent congressional intent to the contrary on the way to deciding questions concerning the waiver of other kinds of rights. *Mezzanatto*, 513 U.S. at 201 (waiver of exclusionary rules for statements made in plea discussions); *Metro East*, 294 F. 3d at 928-930 (waiver of applicable attorney's fee rule in favor of American Rule).

Federal Arbitration Act renders an arbitration clause unenforceable in the context of a federal statutory claim – has already, and repeatedly, been decided by the Court.

### C. The Conflict Petitioners Perceive Concerning The Question Presented Does Not Exist

In reasons B for granting the writ, Petitioners argue that there is a deep and general conflict among the Circuit Courts of Appeals concerning whether district courts or arbitrators should decide if an arbitration agreement that precludes pursuit of federal statutory rights is enforceable, and in reason A that the Eighth Circuit's decision in *Larry's United Super, Inc. v. Werries*, 253 F. 3d 1083 (8th Cir. 2001), which holds that an arbitrator should decide whether an arbitration clause that precludes recovery of punitive damages is enforceable in the context of RICO claims, is one component of this conflict.

Reality, however, is otherwise. With the exception of the Eighth Circuit's decision in *Werries*, all of the seven Circuit Courts of Appeals that have considered motions to compel arbitration of federal statutory claims have followed the Court's teachings in *Mitsubishi, McMahon, Gilmer* and *Green Tree* by deciding the enforceability question themselves. *See Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F. 3d 314 (5th Cir. 2002); *McCaskill v. SCI Management Corp.*, 298 F. 3d 677 (7th Cir. 2002); *Johnson v. West Suburban Bank*, 225 F. 3d 366 (3d Cir. 2000); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F. 3d 1054 (11th Cir. 1998); *Cole v. Burns Int'l Security Services*, 105 F. 3d 1465 (D.C. Cir. 1997); *Graham Oil Co. v. ARCO Products Co.*, 43 F. 3d 1244 (9th Cir. 1995).



That leaves only *Werries*, where the Eighth Circuit held:

> At this juncture, our jurisdiction extends only to determine whether a valid agreement to arbitrate exists, not to determine whether public policy conflicts with the remedies provided in the arbitration clause.

235 F. 3d at 1086. To the contrary, however, under the Court's decisions in *Mitsubishi, McMahon, Gilmer* and *Green Tree*, whether the public policy reflected in RICO conflicted with the restricted remedies afforded by the arbitration clause was the very thing the Eighth Circuit needed to consider to, in its words, "determine whether a valid agreement to arbitrate exists." At bottom, then, *Werries* is simply a recent, isolated case to be corrected or marginalized in the normal course of judicial affairs.

Ironically, the mistake Petitioners make in constructing their much different conflict matrix is the same mistake the Eighth Circuit made in *Werries* – going beyond the issue presented and relying on cases that do not involve the validity of arbitration clauses that thwart pursuit of federal statutory rights. *Metro East Center For Conditioning and Health v. Qwest Communications Int'l, Inc.*, 294 F. 3d 924 (7th Cir. 2002) (waiver of common law attorney's fee rights); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F. 3d 536 (8th Cir. 2002) (state statutory rights); *MCI Telecommunications Corp. v. Matrix Communications Corp.*, 135 F. 3d 27 (1st Cir. 1998) (effect of tariff limitation on remedies); *Great Western Mortgage Corp. v. Peacock*, 110 F. 3d 222 (3d Cir. 1997) (waiver of state statutory rights). But if the question of whether Congress has evinced an intent to override the Federal Arbitration Act when the arbitration agreement conflicts with the rights

afforded by a later statute, and thus the question of the arbitration agreement's validity is removed from the equation, all that remains is an arbitration clause that is valid under the Federal Arbitration Act,[2] and the question whether a litigant's waiver of whatever rights are involved will be upheld or invalidated on other grounds. Cases consigning the latter question to arbitration do not speak to the issue of whether the former question, which this Court has held to be the province of courts, should suffer a like fate.[3]

While federal statutory rights were not at issue, the Court's decision in *Prima Paint Corp. v. Floor & Conklin Mfg. Co.*, 388 U.S. 395 (1967), relied upon in many of the above cases, also underscores the dichotomy at work here. The Court held in *Prima Paint* that a claim of fraudulent inducement directed to the arbitration clause itself challenged the validity of "the making of the arbitration agreement" within the meaning of 9 U.S.C. § 4 and thus was an issue for the court to decide; whereas a claim that the entire contract was fraudulently induced did not and was for the arbitrators to decide. *Id.* at 403-404. Similarly, in *Metro East, Arkcom Digital, MCI* and *Great Western*, the

[2] State law cannot render agreements to arbitrate unenforceable under the Federal Arbitration Act. *Southland Corp. v. Keating*, 465 U.S. 1, 10-17 (1984).

[3] Petitioners also miss this dynamic when scattering citations throughout their petition to cases holding, in various contexts not involving federal statutory rights, that parties can waive their rights in arbitration. *E.g., Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (common law right to punitive damages in a negligence case). Here, the issue is not whether the parties can waive their rights, but congressional intent.



issue of waiver of non-federal statutory rights did not go to the validity of the arbitration clause under the Federal Arbitration Act, and thus, under *Prima Paint*, could be decided by arbitrators. On the other hand, when the issue is whether the arbitration agreement is void because it precludes pursuit of federal statutory rights, the issue goes to the validity of the arbitration agreement itself and, under both *Prima Paint* and the Court's decisions in *Mitsubishi, McMahon, Gilmer* and *Green Tree*, is for the court to decide.

### D. The Court's Decision in *Howsam v. Dean Witter Reynolds, Inc.* Will Not Impact The Judgment Below

In reason E for granting the petition, Petitioners suggest that the Court should grant the petition and hold it in abeyance because a reversal in *Howsam v. Dean Witter Reynolds, Inc.* "will almost certainly require the reversal of the judgment" below. However, the question in *Howsam* is entirely different, and its resolution will have no impact on the question Petitioners present or the judgment below.

The issue in *Howsam* emanates from the Court's decision in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), where the question was not, as it is here, whether courts or arbitrators should pass upon the validity or enforceability of an arbitration clause, but who should decide whether a particular claim is arbitrable under an otherwise valid arbitration clause. The Court held that, unless the parties clearly and unmistakably agreed to submit the issue of arbitrability itself to arbitration, courts should decide this issue as well. *Id.* at 943-944.

A standard provision in the NASD Code of Arbitration Procedure provides that "[n]o dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy." *Dean Witter Reynolds, Inc. v. Howsam*, 261 F. 3d 956, 959 (10th Cir. 2001). Over the years a conflict has developed among the Circuit Courts of Appeals as to whether this six (6) year limitation is simply a statute of limitations defense to be decided by arbitrators, or whether it goes to the question of arbitrability itself and thus, under *First Options,* may be decided by the court – an issue that has nothing to do with the instant case.

### E. The Conflict Petitioners Perceive Concerning The Court Of Appeals' Subsidiary Holding Does Not Exist

Although not directed to the question presented, Petitioners argue in reason C for granting the petition that the Court of Appeals' subsidiary holding – that an arbitration agreement barring punitive damages precludes vindication of a RICO plaintiff's statutory right to treble damages – also gives rise to a conflict among the Circuits. Not so.

Petitioners first perceive conflict with the Second Circuit's decision in *Roby v. Corporation of Lloyd's*, 996 F. 2d 1353 (2d Cir. 1993), where the Court of Appeals held that the forum selection, choice of law and arbitration clauses in contracts between American "Names" and Lloyd's of London were enforceable even though the effect would be to deny American plaintiffs the full range of rights and remedies available under United States securities laws and RICO. The problem in *Roby* was not,



however, with the arbitration clause, which merely selected an arbitral over a judicial forum, but with the impact the forum selection and choice of law clauses had on the plaintiffs' remedies. And the point of decision was not, as it is in this case, resolution of the conflict between congressional policy as reflected in the Federal Arbitration Act and in the treble damage provisions of RICO, but a finding that the proper balance between federal statutory rights and the realities of international trade and commerce required a tilt towards the latter, *id.* at 1362-1366, a point this Court has made in several contexts. *E.g., Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) (A choice of forum/law clause is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.").

The absence of any conflict between *Roby* and the Court of Appeals' decision below is amply demonstrated by the fact that the Eleventh Circuit, considering the very same clauses and issues presented in *Roby*, reached the same conclusion while noting that domestic arbitration clauses were different:

> *McMahon*, however, involved the enforceability of an arbitration clause in a *domestic* securities agreement. Although appellants contend that *McMahon* makes clear the Court's categorical unwillingness to permit waiver of the substantive remedies of the securities laws, we do not think that *McMahon* controls the case before us. As stated above, the Court consistently has treated 'truly international agreements,' *Scherk*, 417 U.S. at 515, 94 S. Ct. at 2455, different than domestic transactions. . . .

*Lipcon v. Underwriters At Lloyd's, London*, 148 F. 3d 1285, 1294 (11th Cir. 1998).

Finally, on an issue that goes neither to the question presented nor any other substantial federal question, Petitioners point out that the Fifth Circuit's recent conclusion in *Investment Partners* that the concept of punitive damages does not encompass treble damages conflicts with the decision below. Rather than represent a significant split on the question, however, the *Investment Partners* decision is simply an outlier. Virtually every federal court to consider the question, including this one, has expressed a view consistent with that expressed below. *See, e.g., Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 786 (2000) (treble damages "are essentially punitive in nature"); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish"); *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 427 (1955) (holding that "money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble-damage antitrust recovery must be reported by a taxpayer as gross income"); *Perez v. Z Frank Oldsmobile, Inc.*, 223 F. 3d 617, 624 (7th Cir. 2000) ("Treble damages are a *form* of punitive damages."); *United States v. SCS Business & Technical Institute, Inc.*, 173 F. 3d 870, 877 (D.C. Cir. 1999) (treble damages create a form of punitive damages inconsistent with state liability); *FDIC v. W. R. Grace & Co.*, 877 F. 2d 614, 623 (7th Cir. 1989) ("treble damages are a common form of punitive damages"); *F.C.I. Realty Trust v. Aetna Cas. & Sur. Co.*, 906 F. Supp. 30, 32 n.1 (D. Mass. 1995) ("Treble damages are a form of punitive damages. . . . "). Indeed, the law was sufficiently clear on the subject that the PacifiCare Petitioners did not even bother to raise the issue below.



## CONCLUSION

For the above reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Dated September 12, 2002

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No. 02-215

IN THE
# Supreme Court of the United States

IN RE HUMANA INC. MANAGED CARE LITIGATION

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
*Petitioners*,

v.

JEFFREY BOOK, D.O., *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## REPLY BRIEF

Petitioners PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc. (collectively, "PacifiCare") and petitioners UnitedHealthcare, Inc. and UnitedHealth Group Incorporated (collectively, "United") respectfully file this reply brief on their petition for a writ of certiorari to have this Court review the judgment of the United States Court of Appeals for the Eleventh Circuit in *In re Humana Inc. Managed Care Litig.*, 285 F.3d 971 (11th Cir. 2002).

## I. REASONS FOR GRANTING PETITION.

Plaintiffs Dennis Breen, Jeffrey Book, Manual Porth and Glenn Kelly ("Plaintiffs") advance several arguments as to why this Court should deny PacifiCare and United's certiorari petition, but none of those arguments should deter this Court from reviewing the significant, and erroneous, decision of the Court of Appeals. In fact, since PacifiCare and United filed their petition, the conflict among the Circuits over the issue presented here has only become more stark with the First Circuit's August 20, 2002 decision in *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88 (1st Cir. 2002), adopting the analytical approach set forth in *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001).

### A. The "Question Presented" In The Certiorari Petition Was Presented To And Resolved By The Court Of Appeals And The District Court.

Plaintiffs' principal argument against this Court issuing a writ of certiorari – an argument that has nothing to do with the merits of the pending petition – is that the question presented in the petition was "never properly before the

courts below, and was neither addressed nor resolved by them." Opp. at 4. This argument is fatally flawed.

The core of PacifiCare and United's "question presented" is simple: Must a District Court compel arbitration of a plaintiffs' RICO claims under a valid arbitration agreement even if that agreement does not allow an arbitrator to award punitive damages? PacifiCare and United repeatedly argued in the lower courts that this question must be answered in the affirmative, yet the lower courts repeatedly – and erroneously – rejected these arguments. The question PacifiCare and United present to this Court, therefore, was "properly before the courts below," was "addressed" by both courts, and was "resolved" (erroneously) by both courts. Opp. at 4.

Plaintiffs' criticism of PacifiCare and United's efforts (to have the District Court or the Court of Appeals hold that RICO claims must be arbitrated under an agreement that prohibits punitive damage awards) is surprising given that they never attacked PacifiCare and United's punitive damages limitations in their initial arbitration briefing in the District Court. To the contrary, their opposition to PacifiCare's first arbitration motion never raised an objection to the punitive damages exclusion in the PacifiCare arbitration agreements, and their opposition to United's first arbitration motion was based on their position that United's arbitration agreements "preclud[ed] an award of extracontractual damages," and thereby "eliminate[d] any chance for recovery under RICO." District Court Docket Entry ("D.E.") No. 388 at 76.

The first time Plaintiffs even suggested that arbitration agreements containing punitive damages limitations were



unenforceable was at oral argument before the District Court, and they fleshed out this position in a brief filed with the District Court after oral argument. During and after that oral argument, however, PacifiCare and United's constant refrain to the District Court and the Court of Appeals was that a federal court could not refuse to send RICO claims to arbitration simply because the relevant arbitration agreement barred punitive damages. *See* PacifiCare's Opening Br. (Appeal No. 01-10247) at 14-16; PacifiCare's Reply Br. (Appeal No. 01-10247) at 6-8; United's Opening Br. (Appeal No. 01-10247) at 16-17 & 20-39; United's Reply Br. (Appeal No. 01-10247) at 1-8; PacifiCare's Opening Br. (Appeal No. 01-12596) at 18-20; PacifiCare Reply Br. (Appeal No. 01-12596) at 7-11; D.E. No. 421 at 7; D.E. No. 583 at 13-16; D.E. No. 694 at 1-2; D.E. No. 848 at 46; D.E. No. 965 at 3.[1] The District Court and the Court of Appeals resolved this dispute by holding that a court should not send RICO claims to arbitration under an arbitration agreement that does not authorize punitive damages. *See* 285 F.3d at 973-74 & n.3; 143 F.Supp.2d 1371, 1374 (S.D. Fla. 2001); 132 F. Supp.2d 989, 1001 & 1005 (S.D. Fla. 2001). The question presented in PacifiCare and United's petition, therefore, was properly raised before the Courts below, was

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[1] Additionally, several defendants, including United, explained to the District Court that "unconscionability" should be decided by an arbitrator. *See* D.E. No. 583 at 18. The defendants argued that Plaintiffs' objections to defendants' agreements (which included the remedies limitations) sounded in substantive unconscionability, *see id.* at 11-12, making them issues to be decided by the arbitrator. The District Court bypassed this argument. *See* 132 F.Supp.2d at 1001.

resolved by those Courts, and is ripe for resolution by this Court.[2]

Finally, even if the Court were to harbor some reservations about how well the question before the Court was presented to the District Court and Court of Appeals, any reservations should be erased by the recognition that the question presented here raises a pure issue of law concerning the proper interpretation of RICO and the Federal Arbitration Act ("FAA"), and there are no facts in dispute relevant to that issue. The question therefore is "'appropriate for [this Court's] immediate resolution'" regardless of whether it was "addressed by the Court of Appeals." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982)). *See also United States v. Locke*, 471 U.S. 84, 93 (1985) ("Although the District Court did not address this argument, the argument raises a question sufficiently legal in nature that we choose to address it even in the absence of lower court analysis"). This is all the more true given that the question has so clearly split the United States Courts of Appeals. *See, e.g., Investment Partners v. Glamour Shots Lic., Inc.*, 298 F.3d 314, 318 (5th Cir. 2002);

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[2] The focus of PacifiCare and United's arguments in the District Court and Court of Appeals was that, under the Federal Arbitration Act, their arbitration agreements were enforceable and the District Court could not refuse to send Plaintiffs' RICO claims to arbitration based on the agreements' punitive damages limitation; the focus was not on how, once the District Court ordered arbitration, an arbitrator might treat the agreements' punitive damages limitation on contract grounds. Plaintiffs now criticize this focus, but the simple fact is that the only question before the District Court was whether PacifiCare and United's arbitration agreements were enforceable, not what an arbitrator should or could do after the District Court compelled arbitration.



*In re Humana*, 285 F.3d at 973-74 & n.3; *Werries*, 253 F.3d at 1086.[3]

### B. The Circuit Split Identified In The Certiorari Petition Is Real And Can Only Be Eliminated By This Court.

Plaintiffs also contend that the Circuit split identified in PacifiCare and United's certiorari petition is illusory, but this contention cannot withstand even basic scrutiny.

To start, Plaintiffs do not, and cannot, explain how *In re Humana*, *Werries* and *Investment Partners* can be reconciled. In a case where a defendant moves to compel a plaintiff to arbitrate a federal statutory cause of action that provides for trebled damages under an arbitration agreement that does not allow an arbitrator to impose "punitive damages," *In re Humana* would require a court to deny the defendant's motion while *Werries* and *Investment Partners* would require the same court to grant the motion. *Compare In re Humana*, 285 F.3d at 973-74 & n.3 *with Investment*

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[3] To the extent Plaintiffs' "waiver"-type argument is based on the fact that neither PacifiCare nor United cited *Werries* to the Court of Appeals or the District Court until the reply brief was filed in Eleventh Circuit Appeal No. 01-12596, *see* Opp. at 5, the argument is meritless. *Werries* was not decided until June 13, 2001, days before the first brief was filed in Appeal No. 01-12596. Nothing in this Court's precedents required either PacifiCare or United to cite *Werries* to the District Court and Court of Appeals in order to preserve their argument that the District Court erred in refusing to compel arbitration based on a punitive damages limitation in an arbitration agreement. Indeed, it would be impossible to comply with such a rule since it would force PacifiCare and United to cite to cases before they are even published and publicly available. Of course, after *Werries* was decided, that case was presented to the Court of Appeals both in the Appeal No. 01-12596 reply brief and by counsel for PacifiCare and United at oral argument.

*Partners*, 298 F.3d at 318 *and Werries*, 253 F.3d at 1086. This is the definition of a real and concrete conflict.

Furthermore, Plaintiffs' argument that this Court has already decided the question presented by PacifiCare and United (Opp. at 6-10) is bizarre, to say the least. To support this argument, Plaintiffs cite to, among other cases, *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220 (1987), but that case squarely holds that nothing in either the FAA or RICO prohibits the arbitration of "civil RICO claims brought against legitimate enterprises," and that there was no conflict, either expressed or implied, between arbitration and the policies that animate RICO. *Id.* at 242. If *McMahon* has already decided the question presented in this case, then it has decided the question in favor of PacifiCare and United, and this Court should summarily reverse the Court of Appeals' decision. No other outcome could stand against this Court's precedents, which have consistently held that statutory causes of action brought by private parties are fully arbitrable. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27-28, 35 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-483 (1989); *McMahon*, 482 U.S. at 242; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).[4]

Finally, Plaintiffs fare no better when they argue that, with the exception of *Werries*, "all of the seven Circuit Courts of Appeals that have considered motions to compel arbitration of federal statutory claims have followed the

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[4] The Court did once hold that federal securities claims were inarbitrable, *see Wilko v. Swan*, 346 U.S. 427 (1953), but the Court overruled *Wilko* in *Rodriguez de Quijas*, 490 U.S. at 485.



Court's teachings in *Mitsubishi*, *McMahon*, *Gilmer* and *Green Tree* by deciding the enforceability question themselves." Opp. at 10. All parties agree that the question of whether Congress intended a given federal statutory cause of action to be inarbitrable is a question for a court, not an arbitrator, to decide.[5] As noted above, however, that question has already been settled for RICO causes of action when the Court held in *McMahon* that RICO actions are fully arbitrable. *See* 482 U.S. at 242. The question implicated in this case is markedly different: It is whether a District Court can refuse to send an otherwise arbitrable cause of action to arbitration simply because the parties agreed to limit the remedies they can obtain in arbitration. Over that question, the Courts of Appeals are hopelessly divided. *Compare Thompson*, 300 F.3d at 91-92[6] *and Werries*, 253 F.3d at 1086 *and MCI Telecomm. Corp. v.*

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[5] PacifiCare and United, however, do not agree that the cases cited by Plaintiffs on page 10 of their Opposition all support the quote set out in the text above. *McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677 (7th Cir. 2002), for example, has no majority opinion, so it does not support Plaintiffs' point. Additionally, *Investment Partners* does not resolve the question of whether antitrust causes of action are arbitrable; that was resolved seventeen years earlier by this Court in *Mitsubishi*. Instead, *Investment Partners* addresses the issue presented in this certiorari petition – whether a court can refuse to send a cause of action to arbitration because the parties voluntarily agreed to limit their remedies in arbitration.

[6] The First Circuit decided *Thompson* fourteen days after PacifiCare and United filed their certiorari petition. In *Thompson*, the Court of Appeals affirmed the district court's order to compel arbitration, despite the plaintiffs' argument that the subject arbitration clause deprived them of their statutory rights under the Truth In Lending Act. Recognizing a split among the Circuits, the Court of Appeals in *Thompson* decided to follow *Werries* and held that a District Court cannot refuse to compel arbitration because the arbitration agreement at issue limited federal statutory remedies. *See* 300 F.3d at 91-92.

*Matrix Commun. Corp.*, 135 F.3d 27, 33 n.12 (1st Cir. 1998) *and Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-232 (3rd Cir. 1997) *with Investment Partners*, 298 F.3d at 318 *and In re Humana*, 285 F.3d at 973-74 (adopting *In re Managed Care*, 132 F. Supp.2d at 1000-01 & 1005) *and Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1247-49 (9th Cir. 1995). *See also Metro East Center for Conditioning & Health v. Qwest Commun. Int'l, Inc.*, 294 F.3d 924, 929 (7th Cir. 2002) (recognizing that *Werries*, *MCI* and *Great Western* "have held that ... the arbitrator determines whether contractual limitations on remedies [in arbitration agreements] are valid"); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1356-58 (2nd Cir. 1993) (plaintiffs must submit to arbitration in England as required by their contracts even though English arbitrator could not award them RICO trebled damages).[7]

[7] Plaintiffs seek to distinguish *MCI* and *Great Western* on the basis that neither involved federal statutory rights. *See* Opp. at 12. As to *MCI*, Plaintiffs are inventing this distinction out of whole cloth because the *MCI* Court never asserts that the only causes of action before it were based on State law. In any event, the same Circuit that decided *MCI* (the First Circuit) later decided *Thompson*, which clearly involved federal statutory rights. *See* 300 F.3d at 89. As to *Great Western*, that case did involve only State law causes of action, but the *Great Western* Court never suggested that its analytical approach would have been any different if it were confronted with federal causes of action. Indeed, both *Thompson* and *Werries* viewed the *Great Western* analytical approach as equally available to federal actions. *See Thompson*, 300 F.3d at 91-92; *Werries*, 253 F.3d at 1085-1086.



### C. Howsam v. Dean Witter Reynolds, Inc. Will Likely Impact The Question Presented In This Certiorari Petition.

Plaintiffs contend that there is no reason for the Court to hold this case in light of *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, because the resolution of *Howsam* "will have no impact on the question [PacifiCare and United] present or the judgment below." Opp. at 13. Plaintiffs thereafter spend a page of text summarizing *Howsam*, but notably absent from that page is any effort to show that the Court's *Howsam* decision "will have no impact" on the instant case. This failure is not an oversight, but a recognition of what PacifiCare and United noted in their certiorari petition: In all likelihood, the Court's *Howsam* decision will address the proper allocation of authority between a court asked to compel arbitration versus an arbitrator selected by the parties to arbitrate their substantive disputes. That allocation of authority is central to the issue in *Howsam* – whether a District Court can refuse to compel arbitration of an otherwise arbitrable cause of action because the action might be time-barred – and to the issue here – whether a District Court can refuse to compel arbitration of an otherwise arbitrable cause of action because the parties agreed to limit their remedies in arbitration.

## II. CONCLUSION.

For the foregoing reasons, Petitioners PacifiCare Health Systems, Inc., PacifiCare Operations, Inc., United HealthCare, Inc. and UnitedHealth Group Incorporated respectfully requests that this Court grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its judgment in *In*

*re Humana Inc. Managed Care Litigation.* Alternatively, Petitioners respectfully request that this Court hold this petition pending its decision in *Howsam v. Dean Witter Reynolds, Inc.*, No. 01-800, and, after that decision is issued, grant this petition, vacate the Court of Appeals' judgment, and remand this matter to the Court of Appeals for further proceedings consistent with *Howsam*.

DATED: September 26, 2002.

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Supreme Court, U.S.
FILED
DEC 6 2002
OFFICE OF THE CLERK

No. 02-215

IN THE

# Supreme Court of the United States

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IN RE HUMANA INC., MANAGED CARE LITIGATION
PACIFICARE HEALTH SYSTEM, INC. *et al.*
*Petitioners,*

v.

JEFFREY BOOK, D.O., *et al.*
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## JOINT APPENDIX

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BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MIAMI

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Case No. ___

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PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
*Petitioners*,

v.

JEFFREY BOOK, D.O. *et al.*,
*Respondents*.

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**DOCKET ENTRIES**

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 11/22/02 | 1740 | RESPONSE by Provider Plaintiffs to [1696-1] motion to strike [1637-1] notice of dismissal, and [1696-2] motion for involuntary dismissal with prejudice of arbitrable claims (wc) [Entry date 11/25/02] |
| 11/20/02 | 1737 | MOTION with memorandum in support by United Healthcare for reconsideration of [1705-1] order granting Plaintiffs' motion to enjoin arbitration for stay of Provider Track discovery (wc) [Entry date 11/21/02] |
| 11/15/02 | 1730 | OPPOSITION by Provider Plaintiffs to United Healthcare, Inc.'s and United Health Group Inc.'s Supplemental Motion to Dismiss and Notice of its Renewal of its motions to compel arbitration and to stay proceedings pending arbitration (wc) [Entry date 11/18/02] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 11/15/02 | 1729 | RESPONSE by Provider Plaintiffs to [1651-1] notice of renewal of its motions to compel arbitration (wc) [Entry date 11/18/02] |
| 11/15/02 | 1728 | OPPOSITION by Provider Plaintiffs to [1653-1] motion to compel arbitration, [1653-2] motion to dismiss claims, [1653-3] motion to stay proceedings pending arbitration (wc) [Entry date 11/18/02] |
| 11/15/02 | 1727 | OPPOSITION by Provider Plaintiffs to [1668-1] renewed motion to compel arbitration (wc) [Entry date 11/18/02] |
| 11/15/02 | 1726 | RESPONSE by Provider Plaintiffs to [1663-1] notice of renewal of its motions to compel arbitration (wc) [Entry date 11/18/02] |
| 11/15/02 | 1725 | OPPOSITION by Provider Plaintiffs to [1649-1] second motion to compel arbitration (wc) [Entry date 11/18/02] |
| 11/15/02 | 1724 | OPPOSITION by Provider Plaintiffs to [1666-1] motion to compel arbitration (wc) [Entry date 11/18/02] |
| 11/15/02 | 1723 | OPPOSITION by Provider Plaintiffs to [1659-1] motion to compel arbitration (wc) [Entry date 11/18/02] |
| 11/15/02 | 1720 | SUPPLEMENTAL NOTICE of dismissal of arbitrable claims by Provider Plaintiffs (wc) [Entry date 11/18/02] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 11/15/02 | 1719 | MEMORANDUM by Provider Plaintiffs in opposition to [1696-2] motion for involuntary dismissal with prejudice of arbitrable claims, [1664-1] motion to dismiss Second Amended, Consolidated Class Action Complaint, [1662-1] joint motion to dismiss Second Amended Consolidated Class Action Complaint, [1657-1] motion to dismiss claims against United which this Court has already deemed subject to arbitration, as well as those claims against United which this Court may ultimately deem to be subject to arbitration pursuant to United's pending motions to compel arbitration, [1656-1] motion to dismiss Second Amended Consolidated Class Action Complaint and the "Non-Par Claims" and the "Associational Claims" against PacifiCare, [1647-1] motion to dismiss Provider Plaintiffs' Second Ameded Consolidated Class Action Complaint (wc) [Entry date 11/18/02] |
| 11/15/02 | 1717 | MOTION with memorandum in support by Pacificare Health to compel Arbitration (wc) [Entry date 11/18/02] |
| 11/12/02 | 1710 | ORDER denying [1708-1] motion to extend time to file responses to motions to dismiss and motions to compel arbitration ( Signed by Judge Federico A. Moreno on 11/12/02) [EOD Date: 11/13/02] (wc) [Entry date 11/13/02] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 11/8/02 | 1708 | RENEWED, AGREED MOTION by Provider Plaintiffs to extend time to file responses to motions to dismiss and motions to compel arbitration (wc) [Entry date 11/12/02] |
| 11/6/02 | 1705 | ORDER granting [1272-1] motion for clarification of [711-1] arbitration order and to enjoin arbitration; An injunction is issued preventing Defendants from proceeding with the arbitration proceedings until further notice from this Court (Signed by Judge Federico A. Moreno on 11/6/02) [EOD Date: 11/7/02] (wc) [Entry date 11/07/02] |
| 11/6/02 | 1704 | ORDER granting [1693-1] motion to extend time to file responses to Motions to Dismiss and Motions to Compel arbitration Response to motion reset to 11/15/02 for [1668-1] motion to compel arbitration, reset to 11/15/02 for [1666-1] motion to compel arbitration, reset to 11/15/02 for [1664-1] motion to dismiss Second Amended, Consolidated Class Action Complaint, reset to 11/15/02 for [1662-1] joint motion to dismiss Second Amended Consolidated Class Action Complaint, reset to 11/15/02 for [1659-1] motion to compel arbitration, reset to 11/15/02 for [1657-1] motion to dismiss claims against United which this Court has already deemed subject to arbitration, as well as those claims against United which this Court may ultimately deem to be subject to arbitration pursuant to United's pending motions to compel |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | arbitration, reset to 11/15/02 for [1653-1] motion to compel arbitration, reset to 11/15/02 for [1653-2] motion to dismiss claims, reset to 11/15/02 for [1653-3] motion to stay proceedings pending arbitration, reset to 11/15/02 for [1649-1] motion to compel arbitration, reset to 11/15/02 for [1647-1] motion to dismiss Provider Plaintiffs' Second Ameded Consolidated Class Action Complaint ( Signed by Judge Federico A. Moreno on 11/6/02) [EOD Date: 11/7/02] (wc) [Entry date 11/07/02] |
| 11/4/02 | 1697 | PROVIDER TRACK MOTION by Provider Plaintiffs to extend time to file responses to Defendants' motions to dismiss, and Plaintiff's motion to compel arbitration (ct) [Entry date 11/05/02 |
| 11/1/02 | 1696 | PROVIDER TRACK MOTION by United Healthcare, United Health Group to strike [1637-1] notice, and for involuntary dismissal with prejudice of arbitrable claims (nt) [Entry date 11/04/02] |
| 10/31/02 | 1693 | MOTION by Provider Plaintiffs to extend time to file responses to Motions to Dismiss and Motions to Compel arbitration (wc) [Entry date 11/01/02] |
| 10/23/02 | 1676 | NOTICE of Filing original declaration of Benton Davis in support of Renewed Motion to Compel Arbitration by Humana Health Plan, Humana, Inc. (wc) [Entry date 10/25/02] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 10/23/02 | 1675 | DECLARATION of Benton Davis by Humana Health Plan, Humana, Inc. Re: [1668-1] renewed motion to compel arbitration (wc) [Entry date 10/25/02] |
| 10/18/02 | 1668 | RENEWED MOTION with memorandum in support by Humana Health Plan, Humana, Inc. to compel arbitration (wc) [Entry date 10/21/02] |
| 10/18/02 | 1667 | MEMORANDUM by Anthem Health Plans in support of [1666-1] motion to compel arbitration (wc) [Entry date 10/21/02] |
| 10/18/02 | 1666 | MOTION by Anthem Health Plans to compel arbitration (wc) [Entry date 10/21/02] |
| 10/18/02 | 1663 | NOTICE of Renewal of its Motions to Compel Arbitration by Aetna, Inc. (wc) [Entry date 10/21/02] |
| 10/18/02 | 1661 | DECLARATION of Sharon Mos by Wellpoint Health Re: [1659-1] motion to compel arbitration re: Georgia Blue Plaintiffs (wc) [Entry date 10/21/02] |
| 10/18/02 | 1660 | MEMORANDUM of Points and Authorities by Wellpoint Health in support of [1659-1] motion to compel arbitration (wc) [Entry date 10/21/02] |
| 10/18/02 | 1659 | MOTION by Wellpoint Health to compel arbitration (wc) [Entry date 10/21/02] |
| 10/18/02 | 1657 | NOTICE of Renewal of its motions to compel arbitration and to stay proceedings pending arbitration by United Healthcare, United Health Group (wc) [Entry date 10/21/02] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 10/18/02 | 1654 | APPENDIX to: [1653-1] motion to compel arbitration, [1653-2] motion to dismiss claims, [1653-3] motion to stay proceedings pending arbitration by Cigna Defendants (wc) [Entry date 10/21/02] |
| 10/18/02 | 1653 | SECOND SUPPLEMENTAL MOTION with memorandum in support by Cigna Defendants to compel arbitration, and to dismiss claims, or to stay proceedings pending arbitration (wc) [Entry date 10/21/02] |
| 10/18/02 | 1651 | NOTICE of Renewal of its Motions to Compel Arbitration by Health Net, Inc. (wc) [Entry date 10/21/02] |
| 10/17/02 | 1650 | PROVIDER TRACK BRIEF by Coventry Health Care in re: second motion to compel arbitration (ct) [Entry date 10/18/02] |
| 10/17/02 | 1649 | PROVIDER TRACK SECOND MOTION by Coventry Health Care to compel arbitration (ct) [Entry date 10/18/02] |
| 10/10/02 | 1637 | NOTICE of DISMISSAL OF ARBITRABLE CLAIMS by Provider Plaintiffs (ct) [Entry date 10/11/02] |
| 9/26/02 | 1616 | ALL TRACK ORDER denying [704-1] motion to certify class action, denying [359-1] motion to certify class action, denying [356-1] motion to certify class action, denying [353-1] motion to certify class action, denying [350-1] motion to certify class action, denying [347-1] motion to certify class action, denying [343-1] motion to certify class action, denying [188-1] motion |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | class certification ( Signed by Judge Federico A. Moreno on 9/26/02) [EOD Date: 9/26/02] (ct) |
| 9/19/02 | 1606 | REPLY BRIEF by Pacificare Health on [1564-1] motion to compel arbrition as to plaintiffs Boxstein, Breen, Ghalambor, Klay, A. Taleisnik, J. Taleisnik and Wilson (ct) [Entry date 09/20/02] |
| 9/19/02 | 1605 | REPLY MEMORANDUM by Aetna, Inc. in support of [1567-1] motion to compel arbrition, [1567-2] motion to dismiss claims, [1567-3] motion to stay this action (ct) [Entry date 09/20/02 |
| 9/19/02 | 1604 | REPLY momorandum by Cigna Defendants in support of [1569-1] motion to compel arbitration, [1569-2] motion to dismiss claim, [1569-3] motion to stay proceedings pending arbitration (ct) [Entry date 09/20/02] |
| 9/17/02 | 1602 | CONSOLIDATED REPLY by Health Net, Inc. in support of [1558-1] motion to compel arbitration of any claims plaintiffs Navid Ghalambor, MD, Susan Hansen, MD, Andres Taleisnik, MD, Taleisnik, MD or Roger Wilson, MD may be asserting against Health Net, Inc., regarding services provided as nonparticipating provider, [1570-2] motion to compel arbitration as to plaintiff Navid Ghalambor (ct) [Entry date 09/18/02] |
| 9/10/02 | 1595 | PROVIDER TRACK ORDER granting [1586-1] motion for Removal and Return of Inadvertently Disclosed Information. Court |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | hereby substitutes corrected exhibits to [1168-1] motion to compel arbitration, [1168-2] motion to dismiss claims, [1168-3] motion to stay proceedings pending arbitration [1228-1] motion to compel arbitration, [1228-2] motion to dismiss claims, [1228-3] motion to stay proceedings pending arbitration. Court directs Clerk to destroy copies of uncorrected versions. (See Order for further details.) ( Signed by Judge Federico A. Moreno on 09/09/02) [EOD Date: 9/10/02] (nt) |
| 9/9/02 | 1594 | PROVIDER TRACK MEMORANDUM by Provider Plaintiffs in opposition to [1564-1] motion to compel arbrition as to plaintiffs Boxstein, Breen, Ghalambor, Klay, A. Taleisnik, J. Taleisnik and Wilson (nt) [Entry date 09/10/02] |
| 9/9/02 | 1593 | PROVIDER TRACK MEMORANDUM OF LAW IN RESPONSE by Provider Plaintiffs to [1569-1] motion to compel arbitration, [1569-2] motion to dismiss cliam, [1569-3] motion to stay proceedings pending arbitration (nt) [Entry date 09/10/02] |
| 9/9/02 | 1592 | PROVIDER TRACK MEMORANDUM OF LAW IN RESPONSE by Provider Plaintiffs to [1567-1] motion to compel arbrition, [1567-2] motion to dismiss claims, [1567-3] motion to stay this action (nt) [Entry date 09/10/02] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 9/9/02 | 1591 | PROVIDER TRACK MEMORANDUM OF LAW IN RESPONSE by Provider Plaintiffs to [1570-1] motion to strike portions of plaintiffs' consolidated amended class action complaint relating to Navid Ghalambor, [1570-2] motion to compel arbitration as to plaintiff Navid Ghalambor (nt) [Entry date 09/10/02] |
| 9/9/02 | 1590 | PROVIDER TRACK CONSOLIDATED MEMORANDUM OF LAW IN RESPONSE by Provider Plaintiffs to [1558-1] motion to compel arbitration of any claims plaintiffs Navid Ghalambor, MD, Susan Hansen, MD, Andres Taleisnik, MD, Julio Taleisnik, MD or Roger Wilson, MD may be asscrting against Health Net, Inc., regarding services provided as nonparticipating provider. [1557-1] motion to compel arbitration of the claims asserted by Navid Ghalambor, MD as a participating provider (nt) [Entry date 09/10/02] |
| 9/9/02 | 1588 | PROVIDER TRACK MOTION by Edgar Borrero, Zachery Rosenberg for clarification that they are not required to respond to motions to compel arbitration, or, alternatively, to extend time to respond to such motions (nt) [Entry date 09/10/02] |
| 9/4/02 | 1585 | ORDER granting [1551-1] motion for Hearing on [1272-1] motion for clarification of [711-1] arbitration order granting [1577-1] motion for Hearing on [1272-1] motion for clarification of [711-1] arbitration order Motion hearing before Judge Federico A. |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | Moreno set for 10:00 10/8/02 for [1272-1] motion for clarification of [711-1] arbitration order ( Signed by Judge Federico A. Moreno on 8/30/02) [EOD Date: 9/5/02] (ct) [Entry date 09/05/02] |
| 8/30/02 | 1579 | ORDER granting [1578-1] motion to substitute redacted copies of attachment to its supplemental motion to compel arbitration, dismiss claims and stay this action ( Signed by Judge Federico A. Moreno on 8/30/02) [EOD Date: 9/3/02] (cj) [Entry date 09/03/02] |
| 8/28/02 | 1578 | MOTION by Aetna, Inc. to substitute redacted copies of attachment to its supplemental motion to compel arbitration, dismiss claims and stay this action (ct) [Entry date 08/29/02] |
| 8/22/02 | 1577 | MOTION by United Healthcare for Hearing on [1272-1] motion for clarification of [711-1] arbitration order (ct) [Entry date 08/23/02] |
| 8/20/02 | 1575 | Provider Track Declaration of Katrina Pelto by Pacificare Health in support of [1564-1] motion to compel arbrition as to plaintiffs Boxstein, Breen, Ghalambor, Klay, A. Taleisnik, J. Taleisnik and Wilson (ct) [Entry date 08/21/02] |
| 8/20/02 | 1574 | PROVIDER TRACK NOTICE of filing original declaration in support of defendant Pacificare Health Systems, Inc., supplemental motion to compel arbitration as to plaintiffs Boxstein, Breen, Ghalambor, A. |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | Teleisnik, J. Taleisnik and Wilson by Pacificare Health (ct) [Entry date 08/21/02] [Edit date 08/21/02] |
| 8/16/02 | 1573 | APPENDIX to: [1569-1] motion to compel arbitration, [1569-2] motion to dismiss cliam, [1569-3] motion to stay proceedings pending arbitration by Cigna Corporation (ct) [Entry date 08/19/02] |
| 8/16/02 | 1572 | MEMORANDUM of points and authority by Aetna, Inc. in support of [1567-1] motion to compel arbrition, [1567-2] motion to dismiss claims, [1567-3] motion to stay this action (ct) [Entry date 08/19/02] |
| 8/16/02 | 1571 | MOTION by United Healthcare NJ, United Healthcare, United Health Group for leave to file additional motions to compel arbitration based on discovery (ct) [Entry date 08/19/02] |
| 8/16/02 | 1571 | PROVIDER TRACK JOINDER in motion to compel arbitration by co-defendants by United Healthcare, United Health Group, United Healthcare NJ (ct) [Entry date 08/19/02] |
| 8/16/02 | 1570 | MOTION with memorandum in support by United Healthcare to strike portions of plaintiffs' consolidated amended class action complaint relating to Navid Ghalambor, or to compel arbitration as to plaintiff Navid Ghalambor (ct) [Entry date 08/19/02] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 8/16/02 | 1569 | PROVIDER TRACK CORRECTED AND SUPPLEMENTAL MOTION with memorandum in support by Cigna Corporation to compel arbitration, and to dismiss cliam, or to stay proceedings pending arbitration (ct) [Entry date 08/19/02] |
| 8/16/02 | 1568 | MOTION by Aetna, Inc. for leave to file additional motions to compel arbitration based on discovery (ct) [Entry date 08/19/02] |
| 8/16/02 | 1568 | JOINDER in motions to compel arbrition of co-defendants by Aetna, Inc. (ct) [Entry date 08/19/02] |
| 8/16/02 | 1567 | PROVIDER TRACK SUPPLEMENTAL MOTION by Aetna, Inc. to compel arbrition, to dismiss claims, and to stay this action (ct) [Entry date 08/19/02] |
| 8/16/02 | 1566 | NOTICE of filing declaration of Katrina Pelto and Valerie Blomquist in support of defendant PacifiCare supplemental motion to compel arbitration by Pacificare Health (ct) [Entry date 08/19/02] |
| 8/16/02 | 1565 | PROVIDER TRACK MOTION by Pacificare Health for leave to file additional motions to compel arbitration based on discovery (ct) [Entry date 08/19/02] |
| 8/16/02 | 1565 | Pacificare Health joinder in motion to compel arbitration of co-defendants (ct) [Entry date 08/19/02] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 8/16/02 | 1564 | PROVIDER TRACK MOTION with memorandum in support by Pacificare Health to compel arbrition as to plaintiffs Boxstein, Breen, Ghalambor, Klay, A. Taleisnik, J. Taleisnik and Wilson (ct) [Entry date 08/19/02] |
| 8/16/02 | 1563 | PROVIDER TRACK MOTION by Prudential Insurance to extend time to file motion to compel arbitation (ct) [Entry date 08/19/02] |
| 8/16/02 | 1562 | PROVIDER TRACK MOTION with memorandum in support by United Healthcare to compel plaintiff Zachery Rosenberg to arbitrate his claims , and to stay proceedings pending arbitration (ct) [Entry date 08/19/02] [Edit date 08/19/02] |
| 8/16/02 | 1561 | PROVIDER TRACK MOTION with memorandum in support by United Healthcare, United Healthcare NJ to compel plaintiff John Sutter to arbitrate his cliams, and to stay proceedings pending arbitration (ct) [Entry date 08/19/02] [Edit date 08/19/02] |
| 8/16/02 | 1560 | PROVIDER TRACK MOTION with memorandum in support by United Healthcare, United Health Group to compel Edgar Borrero to arbitrate his cliams, and to stay proceedings pending arbitration (ct) [Entry date 08/19/02] [Edit date 08/19/02] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 8/16/02 | 1559 | APPENDIX to: [1557-1] motion to compel arbitration of the claims asserted by Navid Ghalambor, MD as a participating provider by Health Net, Inc. (ct) [Entry date 08/19/02] |
| 8/16/02 | 1558 | PROVIDER TRACK MOTION with memorandum in support by Health Net, Inc. to compel arbitration of any claims plaintiffs Navid Ghalambor, MD, Susan Hansen, MD, Andres Taleisnik, MD, Julio Taleisnik, MD or Roger Wilson, MD may be asserting against Health Net, Inc., regarding services provided as nonparticipating provider (ct) [Entry date 08/19/02] [Edit date 08/19/02] |
| 8/16/02 | 1557 | PROVIDER TRACK MOTION with memorandum in support by Health Net, Inc. to compel arbitration of the claims asserted by Navid Ghalambor, MD as a participating provider (ct) [Entry date 08/19/02] |
| 8/12/02 | 1551 | MOTION by Provider Plaintiffs for Hearing on [1272-1] motion for clarification of [711-1] arbitration order (ct) [Entry date 08/13/02 |
| 8/12/02 | 1550 | PROVIDER TRACK REPLY by Provider Plaintiffs to response to [1272-1] motion for clarification of [711-1] arbitration order (ct) [Entry date 08/13/02] [Edit date 08/13/02] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 8/12/02 | 1549 | ORDER granting [1547-1] motion for a further 1 day extension of time to file a consolidated reply to all responses to provider plaintiffs' motion for clarification and to enjoin arbitration ( Signed by Judge Federico A. Moreno on 8/12/02) [EOD Date: 8/13/02] (ct) [Entry date 08/13/02] |
| 8/9/02 | 1547 | PROVIDER TRACK MOTION by Provider Plaintiffs for a further 1 day extension of time to file a consolidated reply to all responses to provider plaintiffs' motion for clarification and to enjoin arbitration (ct) [Entry date 08/12/02] |
| 8/7/02 | 1545 | ORDER granting [1543-1] motion to a 4-Day extension of time to file reply to Pacificare Health Systems, Inc.'s response to motion for clarification and to enjoin arbitration by Friday, August 9, 2002. ( Signed by Judge Federico A. Moreno on 8/7/02) [EOD Date: 8/8/02] (ct) [Entry date 08/08/02] |
| 8/5/02 | 1543 | PROVIDER TRACK MOTION by Provider Plaintiffs to a 4-Day extension of time to file reply to Pacificare Health Systems, Inc.'s response to motion for clarification and to enjoin arbitration (ct) [Entry date 08/06/02] |
| 8/1/02 | 1538 | MEMORANDUM by United Healthcare, United Health Group in opposition to [1272-1] motion for clarification of [711-1] arbitration order (ct) [Entry date 08/02/02] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 8/1/02 | 1537 | NOTICE of filing "corrected" memorandum of law in opposition to plaintiffs' motion for clarification of December 11, 2000 arbitration order and to enjoin arbitration of non-arbitrable claims by United Healthcare, United Health Group (ct) [Entry date 08/02/02] |
| 7/31/02 | 1535 | MEMORANDUM by Prudential Insurance in opposition to [1272-1] motion for clarification of [711-1] arbitration order (ct) [Entry date 08/01/02] |
| 7/30/02 | 1533 | MEMORANDUM OF LAW by United Healthcare, United Health Group in opposition to [1272-1] motion for clarification of [711-1] arbitration order (ct) [Entry date 07/31/02] |
| 7/30/02 | 1532 | PROVIDER TRACK RESPONSE by Pacificare Health to [1272-1] motion for clarification of [711-1] arbitration order (ct) [Entry date 07/31/02] [Edit date 07/31/02] |
| 6/29/01 | 1306 | PROVIDER TRACK ORDER denying [1293-1] motion to extend time to file response to Coventry's motion to dismiss and to compel arbitration and to reply to its brief opposing class certification ( Signed by Judge Federico A. Moreno on 06/29/01) [EOD Date: 6/29/01] (nt) |
| 6/26/01 | 1298 | PROVIDER TRACK DECLARATION of Cathy N. Batteer by Pacificare Health Re: [1296-1] motion to compel arbitration as to Plaintiffs Ghalambor and Hansen (nt) [Entry date 06/27/01 |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 6/26/01 | 1298 | PROVIDER TRACK NOTICE of Filing Original Declaration of Cathy N. Batteer by Pacificare Health (nt) [Entry date 06/27/01] |
| 6/26/01 | 1297 | PROVIDER TRACK DECLARATION of Guillermo Cabrera by Pacificare Health Re: [1296-1] motion to compel arbitration as to Plaintiffs Ghalambor and Hansen (nt) [Entry date 06/27/01] |
| 6/26/01 | 1297 | PROVIDER TRACK NOTICE of Filing Original Declaration of Guillermo Cabrera by Pacificare Health (nt) [Entry date 06/27/01] |
| 6/26/01 | 1296 | PROVIDER TRACK MOTION with memorandum in support by Pacificare Health to compel arbitration as to Plaintiffs Ghalambor and Hansen (nt) [Entry date 06/27/01] |
| 6/25/01 | 1293 | PROVIDER TRACK MOTION by Provider Plaintiffs to extend time to file response to Coventry's motion to dismiss and to compel arbitration and to reply to its brief opposing class certification (nt) [Entry date 06/26/01] |
| 6/12/01 | 1272 | PROVIDER TRACK MOTION with memorandum in support by Provider Plaintiffs for clarification of [711-1] arbitration order (nt) [Entry date 06/15/01] |
| 6/12/01 | 1264 | PROVIDER TRACK AGREED ORDER on Cigna Defendants' Agreed Motion for Extension of Time to Serve a Reply Supporting their Amended Motion to Compel Arbitration and to Dismiss Claims or Stay Proceedings Pending Arbitration. Cigna |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | Defendants' response to the Amended Complaint is extended through June 8, 2001. ( Signed by Judge Federico A. Moreno on 06/11/01) CCAP [EOD Date: 6/13/01] (nt) [Entry date 06/13/01] |
| 6/8/01 | 1271 | PROVIDER TRACK REPLY MEMORANDUM by Wellpoint Health to response to [1158-1] motion to compel arbitration (nt) [Entry date 06/13/01] |
| 6/8/01 | 1270 | PROVIDER TRACK REPLY by Cigna Corporation, Cigna Health to response to [1228-1] motion to compel arbitration, [1228-2] motion to dismiss claims, [1228-3] motion to stay proceedings pending arbitratio, [1228-4] amended motion (nt) [Entry date 06/13/01] |
| 6/8/01 | 1269 | PROVIDER TRACK AGREED MOTION by Cigna Corporation, Cigna Health to extend time to serve reply supporting amended motion to compel arbitration and to dismiss claims or stay proceedings pending arbitration (nt) [Entry date 06/13/01 |
| 6/8/01 | 1268 | PROVIDER TRACK REPLY by Aetna, Inc., Aetna-US to response to [1169-1] motion to compel arbitration, [1169-2] motion to dismiss claims asserted by certain newly-added plaintiffs, [1169-3] motion to stay this action (nt) [Entry date 06/13/01] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 6/8/01 | 1267 | PROVIDER TRACK REPLY by Pacificare Health to response to [1193-1] motion to compel arbitration of conspiracy and aiding-and-abetting claims based on their arbitration commitments with other defendants (nt) [Entry date 06/13/01] |
| 6/8/01 | 1266 | REPLY by Health Net, Inc. in support of its [1165-1] motion to compel arbitration (nt) [Entry date 06/13/01] |
| 6/8/01 | 1254 | PROVIDER TRACK APPENDIX in support of: [1253-1] response reply by United Healthcare, United Health Group (nt) [Entry date 06/12/01] |
| 6/8/01 | 1253 | PROVIDER TRACK REPLY by United Healthcare, United Health Group to response to [1182-1] motion to compel plaintiffs to arbitrate their claims (nt) [Entry date 06/12/01] |
| 6/8/01 | 1250 | PROVIDER TRACK BRIEF by Coventry Health Care in support of [1249-1] motion to compel arbitration (nt) [Entry date 06/11/01] |
| 6/8/01 | 1249 | PROVIDER TRACK MOTION by Coventry Health Care to compel arbitration (nt) [Entry date 06/11/01] |
| 6/7/01 | 1245 | PROVIDER TRACK REPLY MEMORANDUM by Prudential Insurance to response to [1137-1] motion to compel to arbitrate their claims (nt) [Entry date 06/08/01] |
| 6/5/01 | 1244 | PROVIDER TRACK ARBITRATION STATUS REPORT by Provider Plaintiffs (nt) [Entry date 06/06/01] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 5/31/01 | 1239 | PROVIDER TRACK ARBITRATION STATUS REPORT by Prudential Insurance (nt) [Entry date 06/01/01] |
| 5/31/01 | 1238 | PROVIDER TRACK ARBITRATION STATUS REPORT by Health Net, Inc. (nt) [Entry date 06/01/01] |
| 5/31/01 | 1237 | PROVIDER TRACK ARBITRATION STATUS REPORT by Cigna Corporation, Cigna Health (nt) [Entry date 06/01/01] |
| 5/31/01 | 1235 | PROVIDER TRACK RESPONSE to [1199-1] Order to Show Cause Related to Dr. Kelly by Provider Plaintiffs (nt) [Entry date 06/01/01] |
| 5/31/01 | 1234 | PROVIDER TRACK RESPONSE by Provider Plaintiffs to [1182-1] motion to compel plaintiffs to arbitrate their claims, [1137-1] to compel to arbitrate their claims, [1168-1] motion to compel arbitration, [1165-1] motion to compel arbitration, [1158-1] motion to compel arbitration (nt) [Entry date 06/01/01] |
| 5/31/01 | 1233 | PROVIDER TRACK RESPONSE by Provider Plaintiffs to [1169-1] motion to compel arbitration (nt) [Entry date 06/01/01] |
| 5/31/01 | 1232 | PROVIDER TRACK RESPONSE by Provider Plaintiffs to [1171-1] motion to compel arbitration (nt) [Entry date 06/01/01] |
| 5/31/01 | 1230 | PROVIDER TRACK ARBITRATION STATUS REPORT by Wellpoint Health (nt) |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 5/30/01 | 1229 | PROVIDER TRACK ARBITRATION STATUS REPORT by United Healthcare, United Health Group (nt) [Entry date 05/31/01] |
| 5/29/01 | 1228 | AMENDED MOTION by Cigna Corporation, Cigna Health to compel arbitration, and to dismiss claims, or to stay proceedings pending arbitratio amending [1168-1] motion to compel arbitration, [1168-2] motion to dismiss claims, [1168-3] motion to stay proceedings pending arbitration (nt) [Entry date 05/30/01] |
| 5/21/01 | 1217 | PROVIDER TRACK ORDER granting [1214-1] motion to extend time to file consolidated response to motions to dismiss, terminating [1213-1] motion to extend time to file consolidated to motions to dismiss Response to motions to dismiss reset to 6/15/01 for [1174-1] joint motion to dismiss consolidated amended class action complaint, reset to 6/15/01 for [1172-1] to dismiss RICO, and claims, reset to 6/15/01 for [1169-2] motion to dismiss claims asserted by certain newly-added plaintiffs, reset to 6/15/01 for [1168-2] motion to dismiss claims, reset to 6/15/01 for [1167-1] motion to dismiss Provider Plaintiffs' Consolidated Amended Class Action Complaint (See Order for further details.) ( Signed by Judge Federico A. Moreno on CCAP [EOD Date: 5/22/01] (nt) [Entry date 05/22/01] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 5/17/01 | 1215 | PROVIDER TRACK ARBITRATION STATUS REPORT by Pacificare Health (nt) [Entry date 05/21/01] |
| 5/14/01 | 1209 | PROVIDER TRACK ORDER granting [1206-1] motion to extend time to file consolidated response to motions to compel arbitration Reply to Response to Motion reset to 5/30/01 for [1193-1] motion to compel arbitration of conspiracy and aiding-and-abetting claims based on their arbitration commitments with other defendants, reset to 5/30/01 for [1182-1] motion to compel plaintiffs to arbitrate their claims, reset to 5/30/01 for [1171-1] motion to compel arbitration, reset to 5/30/01 for [1169-1] motion to compel arbitration, reset to 5/30/01 for [1168-1] motion to compel arbitration, reset to 5/30/01 for [1165-1] motion to compel arbitration, reset to 5/30/01 for [1158-1] motion to compel arbitration, reset to 05/30/01 for [1137-1] motion to compel to arbitrate their claims, reset to 5/30/01 for [1130-1] motion to compel arbitration as to newly added plaintiffs, reset to 5/30/01 for [985-1] motion to compel plaintiffs to arbitrate their claims, reset to 5/30/01 for [991-1] motion to compel arbitration ( Signed by Judge Federico A. Moreno on 05/11/01) CCAP [EOD Date: 5/15/01] (nt) [Entry date 05/15/01] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 5/10/01 | 1207 | PROVIDER TRACK MOTION with memorandum in support by Health Net, Inc. for reconsideration of [1142-1] arbitration order (nt) [Entry date 05/11/01] |
| 5/10/01 | 1206 | PROVIDER TRACK MOTION by Provider Plaintiffs to extend time to file consolidated response to motions to compel arbitration (nt) [Entry date 05/11/01] |
| 5/9/01 | 1202 | PROVIDER TRACK NOTICE Regarding Arbitration by Pacificare Health (nt) [Entry date 05/10/01] |
| 5/9/01 | 1201 | PROVIDER TRACK ORDER Requiring Arbitration Reports Status report due on 5/31/01 ( Signed by Judge Federico A. Moreno on 5/8/01) CCAP [EOD Date: 5/10/01] (nt) [Entry date 05/10/01] |
| 5/4/01 | 1199 | PROVIDER TRACK ORDER OF REMAND AND ORDER TO SHOW CAUSE DIRECTED TO DR. KELLY why the Court should not compel arbitration of isviolation of state prompt pay statute claim. Response to Order to Show Cause due 5/29/01. United may file a response no later than 06/06/01. (See Order for further details.) ( Signed by Judge Federico A. Moreno on 5/4/01) CCAP [EOD Date: 5/10/01] (nt) [Entry date 05/10/01] |
| 5/4/01 | 1194 | PROVIDER TRACK NOTICE of Filing Declaration of Guillermo Cabrera by Pacificare Health (nt) [Entry date 05/08/01] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 5/4/01 | 1193 | PROVIDER TRACK MOTION with memorandum in support by Pacificare Health to compel arbitration of conspiracy and aiding-and-abetting claims based on their arbitration commitments with other defendants (nt) [Entry date 05/08/01] |
| 5/4/01 | 1192 | PROVIDER TRACK SUPPLEMENTAL DECLARATION of Lisa Duran by Wellpoint Health Re: [1158-1] motion to compel arbitration (nt) [Entry date 05/08/01] |
| 5/4/01 | 1190 | PROVIDER TRACK ORDER granting motion for a two-day extension of time to file motion to compel arbitration; motion to compel is due 05/02/01. ( Signed by Judge Federico A. Moreno on 5/1/01) CCAP [EOD Date: 5/8/01] (nt) [Entry date 05/08/01] |
| 5/2/01 | 1184 | PROVIDER TRACK DECLARATION of Marie Chen by Health Net, Inc. Re: [1165-1] motion to compel arbitration (nt) [Entry date 05/03/01] |
| 5/2/01 | 1182 | MOTION with memorandum in support by United Healthcare, United Health Group to compel plaintiffs to arbitrate their claims, and to stay proceedings pending arbitration (nt) [Entry date 05/03/01] |
| 4/30/01 | 1177 | PROVIDER TRACK NOTICE of Joinder and Joinder of [1137-1] motion to compel to arbitrate their claims by Aetna, Inc., Aetna-US (nt) [Entry date 05/02/01] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 4/30/01 | 1171 | PROVIDER TRACK MOTION with memorandum in support by Humana, Inc., Humana Health Plan to compel arbitration (nt) [Entry date 05/01/01] |
| 4/30/01 | 1170 | PROVIDER TRACK MEMORANDUM of Points and Authorities by Aetna, Inc., Aetna-US in support of [1169-1] motion to compel arbitration (nt) [Entry date 05/01/01] |
| 4/30/01 | 1169 | PROVIDER TRACK MOTION by Aetna, Inc., Aetna-US to compel arbitration, to dismiss claims asserted by certain newly-added plaintiffs, and to stay this action (nt) [Entry date 05/01/01] |
| 4/30/01 | 1168 | PROVIDER TRACK MOTION by Cigna Corporation, Cigna Health, Cigna Health-care to compel arbitration, and to dismiss claims, or to stay proceedings pending arbitration (nt) [Entry date 05/01/01] |
| 4/30/01 | 1166 | PROVIDER TRACK APPENDIX to: [1165-1] motion to compel arbitration by Health Net, Inc. (nt) [Entry date 05/01/01] |
| 4/30/01 | 1165 | PROVIDER TRACK MOTION with memorandum in support by Health Net, Inc. to compel arbitration (nt) [Entry date 05/01/01] |
| 4/30/01 | 1164 | PROVIDER TRACK DECLARATION of Lisa Duran by Wellpoint Health Re: [1158-1] motion to compel arbitration (nt) [Entry date 05/01/01] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 4/30/01 | 1163 | PROVIDER TRACK DECLARATION of Scott M. Garringer by Wellpoint Health Re: [1158-1] motion to compel arbitration (nt) [Entry date 05/01/01] |
| 4/30/01 | 1162 | PROVIDER TRACK DECLARATION of Deborah Nalbandian by Wellpoint Health Re: [1158-1] motion to compel arbitration (nt) [Entry date 05/01/01] |
| 4/30/01 | 1161 | PROVIDER TRACK DECLARATION of Joe Garcia by Wellpoint Health Re: [1158-1] motion to compel arbitration (nt) [Entry date 05/01/01] |
| 4/30/01 | 1160 | PROVIDER TRACK DECLARATION of Sue Sheridan by Wellpoint Health Re: [1158-1] motion to compel arbitration (nt) [Entry date 05/01/01] |
| 4/30/01 | 1159 | PROVIDER TRACK MEMORANDUM by Wellpoint Health in support of [1158-1] motion to compel arbitration (nt) [Entry date 05/01/01] |
| 4/30/01 | 1158 | PROVIDER TRACK MOTION by Well-point Health to compel arbitration (nt) [Entry date 05/01/01] |
| 4/27/01 | 1138 | PROVIDER TRACK MEMORANDUM by Prudential Insurance in support of [1137-1] motion to compel to arbitrate their claims (nt) [Entry date 04/30/01] |
| 4/27/01 | 1137 | PROVIDER TRACK MOTION by Pru-dential Insurance to compel to arbitrate their claims (nt) [Entry date 04/30/01] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 4/26/01 | 1142 | PROVIDER TRACK ORDER granting in part [888-1] motion to compel arbitration, and order modifying prior arbitration order concerning Foundation's motion to compel. (See Order for further details.) ( Signed by Judge Federico A. Moreno on 4/25/01) CCAP [EOD Date: 5/1/01] (nt) [Entry date 05/01/01] |
| 4/26/01 | 1136 | PROVIDER TRACK DECLARATION of Cathy N. Batteer by Pacificare Health Re: [1130-1] motion to compel arbitration as to newly added plaintiffs (nt) [Entry date 04/27/01] |
| 4/26/01 | 1135 | PROVIDER TRACK NOTICE of Filing Declaration of Cathy N. Batteer by Pacificare Health (nt) [Entry date 04/27/01] |
| 4/26/01 | 1134 | PROVIDER TRACK DECLARATION of Austin Pittman by Pacificare Health Re: [1130-1] motion to compel arbitration as to newly added plaintiffs (nt) [Entry date 04/27/01] |
| 4/26/01 | 1133 | PROVIDER TRACK NOTICE of Filing Declaration of Austin Pittman by Pacificare Health (nt) [Entry date 04/27/01] |
| 4/26/01 | 1132 | PROVIDER TRACK DECLARATION of Scott Keim by Pacificare Health Re: [1130-1] motion to compel arbitration as to newly added plaintiffs (nt) [Entry date 04/27/01] |
| 4/26/01 | 1131 | PROVIDER TRACK NOTICE of Filing Declaration of Scott Keim by Pacificare Health (nt) [Entry date 04/27/01] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 4/26/01 | 1130 | PROVIDER TRACK MOTION by Pacificare Health to compel arbitration as to newly added plaintiffs (nt) [Entry date 04/27/01] |
| 4/25/01 | 1076 | PROVIDER TRACK NOTICE of Filing Redacted Substitute for Docket Entry #258: Declarations of Kevin Roddy and Cathy N. Batteer in Support of Motion to Compel Arbitration and to Dismiss All Claims by Pacificare Health, Pacificare, Inc. (nt) [Entry date 04/26/01] |
| 4/25/01 | 1075 | PROVIDER TRACK NOTICE of Filing Redacted Substitute for Docket Entries #889 and #899 to #901: Declarations of Scott Keim, Austin Pitman, Pam Leal, Leeba Lesin and James Fazio by Pacificare Health, Pacificare, Inc. (nt) [Entry date 04/26/01] |
| 4/25/01 | 1074 | PROVIDER TRACK NOTICE of Filing Redacted Substitute for Docket Entries #437 & #410: Declaration of Cathy N. Batteer in Support of Motion to Compel Arbitration by Pacificare Health, Pacificare, Inc. (nt) [Entry date 04/26/01] |
| 4/6/01 | 1032 | PROVIDER TRACK REPLY MEMORANDUM by Prudential Insurance in support of [985-1] motion to compel plaintiffs to arbitrate their claims (nt) [Entry date 04/11/01] |
| 4/6/01 | 1027 | PROVIDER TRACK REPLY by United of Florida to memorandum of law in opposition to motion to compel arbitration and for a stay of proceedings (nt) [Entry date 04/09/01] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 4/6/01 | 1026 | PROVIDER TRACK REPLY MEMORANDUM by United of Georgia, United Health Group in support of their motion to compel arbitration and for a stay of proceedings (nt) [Entry date 04/09/01] |
| 4/5/01 | 1024 | PROVIDER TRACK REPLY by Coventry of Georgia, Principal Health to supplemental brief in opposition to motions to compel arbitration and stay proceedings (nt) [Entry date 04/06/01] [Edit date 04/11/01] |
| 4/3/01 | 1023 | PROVIDER TRACK ORDER denying [1016-1] motion to stay proceedings pending appeal of court's order of 12/11/00 granting in part and denying in part various defendant's motions to compel arbitration and motion to stay proceedings pending arbitration ( Signed by Judge Federico A. Moreno on 4/2/01) CCAP [EOD Date: 4/6/01] (nt) [Entry date 04/06/01] |
| 4/2/01 | 1021 | PROVIDER TRACK ORDER denying [1019-1] motion to stay the Provider Track proceedings against Health Net, pending appeal of 12/11/00 order and outcome of the provider arbitrations ( Signed by Judge Federico A. Moreno on 04/02/01) CCAP [EOD Date: 4/3/01] (nt) [Entry date 04/03/01] |
| 3/30/01 | 1020 | PROVIDER TRACK MEMORANDUM by H. Robert Harrison in opposition to motions to compel arbitration and stay proceedings (nt) [Entry date 04/03/01] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 3/29/01 | 1019 | PROVIDER TRACK MOTION by Health Net, Inc. to stay the Provider Track proceedings against Health Net, pending appeal of 12/11/00 order and outcome of the provider arbitrations (nt) [Entry date 04/03/01] |
| 3/29/01 | 1017 | PROVIDER TRACK - MEMORANDUM by William M. Blackshear Jr. in opposition to defendant's supplemental memorandum of law in support of defendant's motion to compel arbitration and for stay of proceedings (mg) [Entry date 03/30/01] |
| 3/29/01 | 1016 | PROVIDER TRACK—MOTION with memorandum in support by United Healthcare, United Health Group to stay proceedings pending appeal of court's order of 12/11/00 granting in part and denying in part various defendant's motions to compel arbitration and motion to stay proceedings pending arbitration (mg) [Entry date 03/30/01] |
| 3/26/01 | 1015 | PROVIDER TRACK—AMENDED COMPLAINT by Provider Plaintiffs , (Answer due 4/5/01 for Aetna of California, for United of Florida, for Prudential Georgia, for Prudential of CA, for Prudential of CT, for Prudential New York, for Prudential Health, for Richard L. Huber, for David Jones, for Edward H. Hanway, Aetna of Georgia, for United of Georgia, for Principal Health, for Coventry Health Care, for Wellpoint Health, for Pacificare, Inc., for Cigna Healthcare, for Humana Insurance, |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | for Humana, Inc., for Connecticut General, for Cigna Health, for Cigna Corporation, for Unnamed Members, for Richard L. Huber, for Aetna-US, for Aetna, Inc., for Humana Health Plan, for United Health Group, for United Healthcare, for Prudential Insurance, for Pacificare for Foundation Health ) amending complaint. to be consistent with court's order of 12/11/00 (order granting in part and denying in part various defendant's motion to compel arbitration) (mg) [Entry date 03/27/01] |
| 3/9/01 | 989 | PROVIDER TRACK SUPPLEMENTAL MEMORANDUM of law by United Healthcare, United of Georgia in support of motion to compel arbitration and for a stay of proceedings (nt) [Entry date 03/12/01] |
| 3/9/01 | 988 | PROVIDER TRACK SUPPLEMENTAL MEMORANDUM of law by United of Florida in support of motion to compel and for a stay of proceedings (nt) [Entry date 03/12/01] |
| 3/9/01 | 986 | PROVIDER TRACK MEMORANDUM by Prudential Insurance in support of [985-1] motion to compel plaintiffs to arbitrate their claims (nt) |
| 3/9/01 | 985 | MOTION by Prudential Insurance to compel plaintiffs to arbitrate their claims (nt) |
| 3/5/01 | 975 | ALL CASES OMNIBUS ORDER #5 Order Setting Supplemental Oral Argument on Motions to Compel, Setting Briefing Schedule for Tag-Along Briefing of Motions to |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | Compel Arbitration, Staying Tag-Along Briefing of Motions to Dismiss and Amending Complaints, Canceling Telephone Status Conference with Milberg Weiss, Requiring Defendants to Designate One Attorney Each for Service of Motions Motion hearing on 02/27/01 8:45 before Judge Federico A. Moreno on [925-1] motion to compel and [948-1] motion to compel and for sanctions, set motions to compel arbitration filing deadline for 3/9/01, tag-along litigants are stayed from filing motions to dismiss and amending complaints until after ruling on lead motions to dismiss, set supplemental telephone tag-along status conference for 10:30 2/26/01 before Judge Federico A. Moreno (See Order for further details.) ( Signed by Judge Federico A. Moreno on 2/28/01) CCAP [EOD Date: 3/6/01] (nt) [Entry date 03/06/01] |
| 3/2/01 | 973 | REPLY Memorandum by Pacificare Health, Pacificare, Inc. to response to [888-1] motion to compel arbitration (nt) [Entry date 03/05/01] |
| 3/2/01 | 972 | PROVIDER TRACK REPLY by Pacificare Health, Pacificare, Inc. to response to [888-1] motion to compel arbitration (nt) [Entry date 03/05/01] |
| 3/2/01 | 971 | PROVIDER TRACK ORDER Granting in Part Without Prejudice Motions to Dismiss Provider Track Complaint granting in part [264-1] motion to dismiss amended complaint, granting in part [307-1] motion to |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | dismiss amended complaint class action, granting in part [310-1] motion to dismiss provider track amended complaint, granting in part [312-1] motion to dismiss ali claims pursuant to Fed. R. Civ. Proc. 9(B) and 12(B)(6), granting in part [317-1] motion to dismiss the complaint, granting in part [393-1] motion to dismiss provider track amended complaint granting in part [319-1] motion to dismiss amended complaint, granting in part [393-1] motion to dismiss provider track amended complaint ( Signed by Judge Federico A. Moreno on 03/02/01) CCAP [EOD Date: 3/2/01] (nt) |
| 2/27/01 | 965 | PROVIDER TRACK REPLY by Pacificare Health, Pacificare, Inc. to response to [888-1] motion to compel arbitration (nt) [Entry date 02/28/01] |
| 2/22/01 | 962 | PROVIDER TRACK RESPONSE by Provider Plaintiffs in opposition to [888-1] motion to compel arbitration (cj) [Entry date 02/23/01] |
| 2/20/01 | 953 | OPPOSITION by Provider Plaintiffs to [888-1] motion to compel arbitration (nt) [Entry date 02/21/01] |
| 2/2/01 | 918 | PROVIDER TRACK ORDER granting [914-1] motion to extend time to file reply to contingent supplemental motion to compel arbitration Response to motion reset to 2/20/01 for [888-1] motion to compel arbitration ( Signed by Judge Federico A. Moreno on 2/2/01) CCAP [EOD Date: 2/7/01] (nt) [Entry date 02/07/01] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 2/1/01 | 914 | PROVIDER TRACK MOTION by Provider Plaintiffs to extend time to file reply to contingent supplemental motion to compel arbitration (nt) [Entry date 02/02/01] |
| 1/26/01 | 888 | PROVIDER TRACK CONTINGENT SUPPLEMENTAL MOTION with memorandum in support by Pacificare Health, Pacificare, Inc. to compel arbitration (nt) [Entry date 01/29/01] |
| 1/24/01 | 875 | ORDER Setting Tag-Along Status Conference, and Granting Plaintiffs' Motions for Leave and Direction; granting [851-1] motion for status conference regarding recently transferred cases, leave to supplement record and file additional briefs on arbitration issue, and direction regarding class certification issue set status conference for 10:30 2/21/01 before Judge Federico A. Moreno ( Signed by Judge Federico A. Moreno on 01/23/01) CCAP [EOD Date: 1/25/01] (nt) [Entry date 01/25/01 |
| 1/22/01 | 863 | ORDER denying in part [752-1] motion for reconsideration of [711-1] order, denying in part [752-2] motion for clarification of [711-1] order it relates to her claims ( Signed by Judge Federico A. Moreno on 1/18/01) CCAP [EOD Date: 1/23/01] (nt) [Entry date 01/23/01] |
| 1/17/01 | 851 | PROVIDER TRACK MOTIONS by Provider Plaintiffs for status conference regarding recently transferred cases, leave to supplement record and file additional briefs |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | on arbitration issue, and direction regarding class certification issue (cj) [Entry date 01/19/01] |
| 12/22/00 | 762 | ORDER granting Provider Plaintiff's [755-1] motion to extend time (60)day to respond to defendant's Pacificare and Blue Cross' renewed motions to compel arbitration and dismiss all claims (in Klay and CMA) Response to motion reset to 2/22/01 for [757-1] motion to compel to immediately produce an adequate 30(b) witness for deposition here in Miami, (2) complete documents responsive to plaintiff's document requests, and for sanctions ( Signed by Judge Federico A. Moreno on 12/21/00) CCAP [EOD Date: 12/27/00] (cj) [Entry date 12/27/00] |
| 12/21/00 | 755 | PROVIDER PLAINTIFFS' MOTION by Provider Plaintiffs to extend time (60)day to respond to defendant's Pacificare and Blue Cross' renewed motions to compel arbitration and dismiss all claims (in Klay and CMA) (cj) [Entry date 12/22/00] |
| 12/11/00 | 712 | PROVIDER TRACK NOTICE of filing original signature page of Declaration of Suzanne K. Fogel in support of Notice of Removal of Motion to Dismiss or, in the alternative of motion to compel arbitration (attached) by Blue Cross of CA (cj) [Entry date 12/12/00] |
| 12/11/00 | 711 | ALL CASES ORDER Granting in Part and Denying in Part Various Defendants' Motions to Compel Arbitration; granting |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | [76-1] motion to compel arbitration, terminating [76-2] motion to dismiss all claims granting in part, denying in part [257-1] motion to compel arbitration, terminating [257-2] motion to dismiss all claims granting part, denying in part [313-1] motion to compel arbitration terminating [314-1] motion to dismiss complaint, granting part, denying in part [314-2] motion to compel arbitration granting in part, denying in part [319-1] motion to dismiss amended complaint granting in part, denying in part [323-1] motion to compel arbitration granting in part, denying in part [457-1] motion to compel arbitration ( Signed by Judge Federico A. Moreno on 12/11/00) CCAP [EOD Date: 12/12/00] (nt) [Entry date 12/12/00] |
| 12/8/00 | 709 | NOTICE of Renewal of Motion to Dismiss or, in the alternative, Incorporation of Motion to Compel Arbitration by Blue Cross of CA (nt) [Entry date 12/11/00] |
| 12/7/00 | 707 | PROVIDER TRACK RESPONSE by Provider Plaintiffs to supplemental memoranda and documents re: arbitration issues (nt) [Entry date 12/08/00] |
| 12/1/00 | 694 | PROVIDER TRACK REPLY BRIEF in Response to Issues Presented to the Court at the 10/26/00 Hearing by Pacificare Health, Pacificare, Inc. (nt) [Entry date 12/04/00] |
| 12/1/00 | 693 | PROVIDER TRACK NOTICE of Renewal of Motions by Pacificare Health, Pacificare, Inc. (nt) [Entry date 12/04/00] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 11/22/00 | 678 | PROVIDER TRACK NOTICE OF FILING SUPPLEMENTAL AUTHORITY from the American Medical Association by Cigna Corporation, Cigna Health, Connecticut General re: motion to compel arbitration (nt) [Entry date 11/28/00] |
| 11/21/00 | 672 | ALL TRACKS NOTICE TO THE PARTIES Re: Delayed Ruling on Motions to Compel Arbitration ( Signed by Judge Federico A. Moreno on 11/20/00) CCAP [EOD Date: 11/28/00] (nt) [Entry date 11/28/00] |
| 11/21/00 | 670 | PROVIDER TRACK NOTICE of filing amended certificate of service for reply in support of motion to compel arbitration by Wellpoint Health (nt) [Entry date 11/28/00] |
| 11/17/00 | 591 | PROVIDER TRACK DECLARATION of Paula E. Ambrosini by Wellpoint Health Re: [457-1] motion to compel arbitration (nt) [Entry date 11/20/00] |
| 11/17/00 | 590 | PROVIDER TRACK REPLY by Wellpoint Health to response to [457-1] motion to compel arbitration (nt) [Entry date 11/20/00] |
| 11/16/00 | 584 | APPENDIX to: supplemental memorandum in support of [313-1] motion to compel arbitration, [317-1] motion to dismiss the complaint by Prudential Insurance (nt) [Entry date 11/20/00 |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 11/16/00 | 583 | PROVIDER TRACK SUPPLEMENT by United Healtcare, United Health Group to: [320-1] support memorandum to motion to dismiss (nt) [Entry date 11/20/00] |
| 11/15/00 | 546 | PROVIDER TRACK REPLY by Coventry of Georgia to response to motion to compel arbitration and stay proceedings (nt) [Entry date 11/16/00] [Edit date 04/11/01] |
| 11/9/00 | 501 | PROVIDER TRACK RESPONSE by Provider Plaintiffs to [483-1] motion to stay discovery pending the resolution of its petition to compel arbitration, [485-1] motion for an expedited briefing schedule and expedited consideration of motion to stay discovery (nt) [Entry date 11/13/00] |
| 11/9/00 | 500 | PROVIDER TRACK ORDER denying [483-1] motion to stay discovery pending the resolution of its petition to compel arbitration denying [485-1] motion for an expedited briefing schedule and expedited consideration of motion to stay discovery. (See Order for further details.) ( by Judge Federico A. Moreno on 11/8/00) CCAP [EOD Date: 11/13/00] (nt) [Entry date 11/13/00] |
| 11/8/00 | 497 | PROVIDER TRACK RESPONSE by Provider Plaintiffs to [457-1] motion to compel arbitration (nt) [Entry date 11/09/00] |
| 11/6/00 | 512 | REPLY by Principal Health to brief in opposition to motion to compel arbitration and stay proceedings (timely filed per chamber's instructions) (nt) [Entry date 11/16/00] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 11/6/00 | 492 | SUPPLEMENTAL BRIEF by Pacificare, Inc., Pacificare Health in Response to Issues Presented to the Court at the 10/26/00 Hearing (nt) [Entry date 11/07/00] |
| 11/1/00 | 484 | MEMORANDUM of Points and Authorities by Wellpoint Health in support of [483-1] motion to stay discovery pending the resolution of its petition to compel arbitration (nt) [Entry date 11/02/00] |
| 11/1/00 | 483 | MOTION by Wellpoint Health to stay discovery pending the resolution of its petition to compel arbitration (nt) [Entry date 11/02/00] |
| 10/30/00 | 478 | PROVIDER TRACK ORDER OMNIBUS ORDER #2 Order Setting Revised Class Certification Briefing Schedule Order Denying Motion to Stay Action and Order Granting Motion for Case Management Conference granting [461-1] motion to extend time to file responsive pleadings to motion for class certification Response to motion reset to 11/17/00 for [443-1] motion to certify class action denying [402-1] motion to stay of action, denying [402-2] motion for discovery pending determination of motion to compel arbitration denying [411-1] motion to stay of discovery, denying [411-2] motion for protective order pending resolution of motion to compel arbitration granting [346-1] motion for case management conference, mooting [346-2] motion to stay, mooting [346-3] motion for reconsideration of [292-1] order in the |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | PROVIDER TRACK cases, [288-1] order in the SUBSCRIBER TRACK cases granting [379-1] motion to join United's motion for case management conference. (See Order for further details.) (Signed by Judge Federico A. Moreno on 10/27/00) CCAP [EOD Date: 10/31/00] (nt) [Entry date 10/31/00] |
| 10/26/00 | 467 | PROVIDER TRACK DECLARATION of Suzanne K. Fogel by Wellpoint Health Re: [457-1] motion to compel arbitration (nt) [Entry date 10/27/00] |
| 10/25/00 | 459 | PROVIDER TRACK DECLARATION of Suzanne K. Fogel by Wellpoint Health Re: [457-1] motion to compel arbitration (nt) [Entry date 10/26/00] |
| 10/25/00 | 459 | NOTICE of filing original declaration of Suzanne K. Fogel by Wellpoint Health (nt) [Entry date 10/26/00] |
| 10/25/00 | 458 | MEMORANDUM of Points and Authorities by Wellpoint Health in support of [457-1] motion to compel arbitration (nt) [Entry date 10/26/00] |
| 10/25/00 | 457 | PROVIDER TRACK MOTION by Wellpoint Health to compel arbitration (nt) [Entry date 10/26/00] |
| 10/16/00 | 424 | PROVIDER TRACK NOTICE of filing corrected reply memorandum in support of motion to compel arbitration and to dismiss the complaint by Prudential Insurance (nt) [Entry date 10/17/00] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 10/13/00 | 421 | PROVIDER TRACK REPLY by United Healtcare, United Health Group to response to [319-1] motion to dismiss amended complaint (nt) [Entry date 10/16/00] |
| 10/13/00 | 420 | PROVIDER TRACK REPLY by Foundation Health to response to [314-1] motion to dismiss complaint, [314-2] motion to compel arbitration (nt) [Entry date 10/16/00] |
| 10/13/00 | 415 | PROVIDER TRACK REPLY MEMORANDUM by Cigna Corporation, Cigna Health to response to [323-1] motion to compel arbitration, [310-1] motion to dismiss provider track amended complaint (nt) [Entry date 10/16/00] |
| 10/13/00 | 414 | PROVIDER TRACK REPLY MEMORANDUM by Prudential Insurance in support of [317-1] motion to dismiss the complaint, [313-1] motion to compel arbitration (nt) [Entry date 10/16/00] |
| 10/13/00 | 411 | PROVIDER TRACK EMERGENCY MOTION by Prudential Insurance to stay of discovery, and for protective order pending resolution of motion to compel arbitration (nt) [Entry date 10/16/00] |
| 10/11/00 | 402 | PROVIDER TRACK MOTION by Cigna Corporation, Cigna Health, Connecticut General to stay of action, and for discovery pending Court's determination of motion to compel arbitration (nt) [Entry date 10/12/00] |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 10/11/00 | 398 | PROVIDER TRACK Notice of compliance with Rule 26.1(I) in Reference to Motion for a Stay of Action and Discovery Pending Court's Determination of Motion to Compel Arbitration by Cigna Corporation, Cigna Health, Connecticut General (nt) [Entry date 10/12/00] |
| 10/6/00 | 388 | PROVIDER TRACK CONSOLIDATED RESPONSE AND MEMORANDUM OF LAW TO DEFENDANTS' MOTION TO DISMISS ANS TO COMPEL ARBITRATION by Provider Plaintiffs to [323-1] motion to compel arbitration, [319-1] motion to dismiss amended complaint, [317-1] motion to dismiss the complaint, [314-1] motion to dismiss complaint, [314-2] motion to compel arbitration, [313-1] motion to compel arbitration, [312-1] motion to dismiss all claims pursuant to Fed. R. Civ. Proc. 9(B) and 12(B)(6), [310-1] motion to dismiss provider track amended complaint, [307-1] motion to dismiss amended complaint action, [264-1] motion to dismiss amended complaint, motion to dismiss for improper venue, [257-1] motion to compel arbitration, [257-2] motion to dismiss all claims, [239-1] motion to dismiss first amended complaint pursuant to Federal Rule of Civil Procedure 12(b), [154-1] motion to dismiss the first amended complaint (nt) [Entry date 10/11/00] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 10/5/00 | 384 | PROVIDER TRACK OMNIBUS ORDER #1 denying [254-1] motion to extend time to respond to Shane's amended complaint denying [255-1] joint motion to extend time to respond to provider plaintiffs' complaint denying [256-1] motion to extend time to respond to Shane's amended complaint granting [259-1] motion for oral argument on [257-1] motion to compel arbitration, [257-2] motion to dismiss all claims setting motion hearing on [257-1] motion to compel arbitration by Pacificare, Inc., Pacificare for 9:00 10/26/00, setting motion hearing on [257-2] motion to dismiss all claims by Pacificare, Inc., Pacificare for 9:00 10/26/00 granting [262-1] motion for Oral Argument on [260-1] motion for suggestion of remand, [260-2] motion to dismiss for improper venue setting motion hearing on [260-1] motion for suggestion of remand by Pacificare, Pacificare Health for 9:00 10/26/00, setting motion hearing on [260-2] motion to dismiss for improper venue by Pacificare, Inc., Pacificare Health for 9:00 10/26/00 denying [263-1] motion to extend time to respond to complaint denying [280-1] motion to extend time to respond to amended complaint granting [334-1] motion to continue the deadline for Wellpoint to bring a motion to dismiss reset answer due for 10/9/00 for Wellpoint Health (See Order for further details.) ( Signed by Judge Federico A. Moreno on 10/4/00) CCAP |



| DATE | NO. | PROCEEDINGS |
|---|---|---|
| | | [EOD Date: 10/6/00] (nt) [Entry date 10/06/00] |
| 9/28/00 | 337 | PROVIDER TRACK NOTICE of Correction of Motion to Dismiss or in the alternative, to Compel Arbitration by Foundation Health (nt) |
| 9/26/00 | 323 | PROVIDER TRACK MOTION with memorandum in support by Cigna Corporation, Cigna Health, Connecticut General to compel arbitration (nt) [Entry date 09/27/00] |
| 9/22/00 | 321 | PROVIDER TRACK APPENDIX to: [320-1] support memorandum by United Healtcare, United Health Group (nt) [Entry date 09/25/00] |
| 9/22/00 | 320 | PROVIDER TRACK MEMORANDUM by United Healtcare, United Health Group in support of [319-1] motion to dismiss amended complaint (nt) [Entry date 09/25/00] |
| 9/22/00 | 319 | PROVIDER TRACK MOTION by United Healtcare, United Health Group to dismiss amended complaint (nt) [Entry date 09/25/00] |
| 9/22/00 | 315 | PROVIDER TRACK MEMORANDUM by Foundation Health in support of [314-1] motion to dismiss complaint, [314-2] motion to compel arbitration (nt) [Entry date 09/25/00] |
| 9/22/00 | 314 | PROVIDER TRACK MOTION by Foundation Health to dismiss complaint, or in the alternative to compel arbitration (nt) [Entry date 09/25/00] |

| DATE | NO. | PROCEEDINGS |
|---|---|---|
| 9/22/00 | 313 | PROVIDER TRACK MOTION by Prudential Insurance to compel arbitration (nt) [Entry date 09/25/00] |
| 9/8/00 | 259 | PROVIDER TRACK MOTION by Pacificare Health, Pacificare, Inc. for oral argument on [257-1] motion to compel arbitration, [257-2] motion to dismiss all claims (nt) [Entry date 09/11/00] |
| 9/8/00 | 258 | PROVIDER TRACK DECLARATION of Kevin Roddy & Cathy N. Batteer by Pacificare Health, Pacificare, Inc. Re: [257-1] motion to compel arbitration, [257-2] motion to dismiss all claims (nt) [Entry date 09/11/00] |
| 9/8/00 | 258 | NOTICE of filing declarations by Pacificare Health, Pacificare, Inc. (nt) [Entry date 09/11/00] |
| 9/8/00 | 257 | PROVIDER TRACK MOTION by Pacificare Health, Pacificare, Inc. to compel arbitration, and to dismiss all claims (nt) [Entry date 09/11/00] |
| 8/14/00 | 167 | AMENDED COMPLAINT , (Answer due 8/24/00 for Humana, Inc., for Connecticut General, for Cigna Health, for Cigna Corporation, for Aetna-US, for Aetna, Inc., for Humana Health Plan, for United Health Group, for United Healtcare, for Prudential Insurance, for Pacificare Health, for Foundation Health ) adding Cigna Healthcare, Pacificare, Inc., Wellpoint Health (nt) [Entry date 08/15/00] |



UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 01-10247-C and No. 01-12596-CC

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PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
*Petitioners*,

v.

JEFFREY BOOK, D.C., *et al.*,
*Respondents.*

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**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 01/23/01 | Civil Appeal Statement Form: Appellant-PacifiCare health Systems, Inc., PacifiCare Health Systems |
| 01/24/01 | Civil Appeal Statement Form: Appellant-United Health Care, United Health Care |
| 03/30/01 | Appellant's Brief Filed: Appellant-PacifiCare Health Systems, Inc., (Atty: Christopher R.J. Pace): Appellant-PacifiCare Operations, Inc., (Atty: Christopher R.J. Pace). PacifiCare Operations, Inc. |
| 04/02/01 | Record Excerpts: Joint rex for all Appellants N/A |
| 04/02/01 | Appellant's Brief Filed: Appellant-Prudential Insurance Company of America, signed by Ronald Ravikoff. Prudential Insurance |
| 04/02/01 | Appellant's Brief Filed: Appellant-United Health Care, Appellant-United Health Group, signed Jeffrey Klein, United Health Group |

| DATE | PROCEEDINGS |
|---|---|
| 04/03/01 | Appellant's Brief Filed: Appellant-Foundation Health Systems, Inc., signed by Mark Filip. N/A |
| 04/03/01 | Appellant's Brief Filed: Appellant-Wellpoint Health Networks, Inc., signed by Stan Blumenfeld. Wellpoint Health Networks |
| 05/15/01 | Appellants' Motion to Stay Proceedings in the District Court. N/A |
| 05/15/01 | Motion to Expedite Review of Appellants' Motion for Stay. N/A |
| 05/21/01 | Response to Motion: Appellee with appendix in support. N/A |
| 05/29/01 | Reply Response to Motion for Stay Proceedings. N/A |
| 06/04/01 | Appellee Brief Filed: Pt'd (COS w/o date) M6/7 Appellees-Freyre, Patricia; Johnson, Sandra; Johnson, Sandra; Katz, Arnold; Price Plaintiffs; Price, Regina Joi; Sessa, Anthony; Yingling, Dawn; signed by Dennis Pantazis. N/A |
| 06/18/01 | Reply Brief Filed: Appellant-Foundation Health Systems, Inc., (Atty: Edward M. Crane): Appellant-Prudential Insurance Company of America, (Atty: John D. Aldock): Appellant-Wellpoint Health Networks, Inc., (Atty: Franklin G. Burt). Wellpoint Health Networks |
| 06/18/01 | Reply Brief Filed: Appellant-PacifiCare Health Systems, Inc., (Atty: Christopher R.J. Pace): Appellant-PacifiCare Health Systems, Inc., (Atty: Christopher R.J. Pace). PacifiCare Health Systems |



| DATE | PROCEEDINGS |
|---|---|
| 06/20/01 | Reply Brief Filed: Appellant-United Health Care, (Atty: Kenneth P Gavsie): Appellant-United Health Group, (Atty: Kenneth P Gavsie): Appellant-United Health Group, (Atty: Kenneth P Gavsie). United Health Group |
| 06/22/01 | 1st Supplemental Record On Appeal. N/A |
| 06/25/01 | Appellants' motion to stay further proceedings in the district court pending disposition of this appeal is GRANTED. Appellants' motion for expedited consideration of their motion to stay is DENIED AS MOOT. N/A |
| 06/25/01 | MOT2 (Motion- Court Action) issued. N/A |
| 07/02/01 | Unopposed Motion to Consolidate: Appellant-PacifiCare Health Systems, Inc., (Atty: Christopher R.J. Pace): Appellant-PacifiCare Operations, Inc., (Atty: Christopher R.J. Pace). PacifiCare Operations, Inc. |
| 07/03/01 | Exhibits. N/A |
| 07/03/01 | Record on Appeal (vol. 6 is sealed). N/A |
| 07/10/01 | Unopposed Motion to Consolidate w/01-12596-CC is GRANTED by AW. Issued 7/11/01.: Appellant-PacifiCare Health Systems, Inc., (Atty: Christopher R.J. Pace). N/A |
| 07/11/01 | MOT2 (Motion-Court Action) issued. N/A |
| 07/13/01 | Appellees' Motion for Limited Relief from Stay/Expedite Appeal. N/A |
| 07/20/01 | 2nd Supplemental Exhibits. N/A |
| 07/20/01 | 2nd Supplemental Record on Appeal. N/A |

| DATE | PROCEEDINGS |
|---|---|
| 07/24/01 | Response to Motion to Lift Stay: Appellant-PacifiCare Health Systems, Inc., (Atty: Christopher R.J. Pace). PacifiCare Health Systems |
| 07/25/01 | Response to Motion to Lift Stay/Expedite: Appellant-United Health Care, (Atty: Kenneth P Gavsie): Appellant-United Health Group, (Atty: Kenneth P Gavsie). United Health Group |
| 07/26/01 | Supplemental Authority for Appellant: Appellant-PacifiCare Health Systems, Inc., (Atty: Christopher R.J. Pace); Appellant-PacifiCare Operations, Inc., (Atty: Christopher R.J. Pace). PacifiCare Operations, Inc. |
| 07/30/01 | Notice of filing: Notice and Stipulation of Resolution of Motion to Partially Lift Stay, which is construed as Motion to Withdraw Motion to Lift Stay. N/A |
| 08/07/01 | . . . motion to expedite consideration of these appeals is GRANTED . . . Appellants' "request for Style Realignment . . . ," . . . is DENIED . . . Appellees' request to change the style . . . is DENIED . . . (see file for complete text). N/A |
| 08/07/01 | MOT2 (Motion-Court Action) issued. N/A |
| 08/07/01 | MOT2 (Motion – Court Action) issued. N/A |
| 01/16/02 | Walter E. Dellinger argued for Appellant; James B. Tilghman, Jr argued for Appellee. N/A |
| 2/11/02 | Motion for Leave to File Supplemental One-Page Brief: Appellant-Foundation Health Systems, Inc., (Atty: Walter E. Dellinger). Foundation Health Systems |



| DATE | PROCEEDINGS |
|---|---|
| 2/13/02 | Response to Motion for Leave to File Supplemental Brief, also construed as, Motion for Leave to File Response Supplemental Brief: Appellee-Price, Regina Joi. Price, Regina Joi |
| 2/19/02 | Supplemental Authority for Appellant: Appellant-Foundation Health Systems, Inc., (Atty: Walter E. Dellinger). Foundation Health Systems |
| 02/27/02 | Appellants' motion and Appellees' response, also construed as a motion, for leave to file supplemental briefs are DENIED. RB/j/. N/A |
| 02/27/02 | MOT2 (Motion—Court Action) issued. N/A |
| 03/14/02 | OPIN1A (Opinion—Issuance with Costs) issued.. N/A |
| 03/14/02 | Opinion Issued 01-10248x, 01-10249x, 01-10250x, 01-10437x, consol. and also filed w/01-12596. N/A |
| 03/14/02 | Judgment Entered. N/A |
| 03/26/02 | Appellees' Motion to Lift Stay; Appellee-Price Plaintiffs, (Atty: Charles P. Ford) (MOOT—see Court's opinion dated 3/14/02). Price Plaintiffs |
| 04/04/02 | Petition for Rehearing En Banc: Appellant-Foundation Health Systems, Inc., (Atty: Walter E. Dellinger). Foundation Health Systems |
| 04/08/02 | Appellants' Response to Motion to Lift Stay: Appellant-Foundation Health Systems, Inc., (Atty: Walter E. Dellinger). Foundation Health Systems |

| DATE | PROCEEDINGS |
|---|---|
| 06/21/02 | The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, the Petition(s) for Rehearing En Banc are DENIED.: Appellant-Foundation Health Systems. N/A |
| 06/21/02 | REHG1 (Rehearing—Transmittal) issued. N/A |
| 06/26/02 | Motion to Stay Mandate: Appellant-PacifiCare Health Systems, Inc., (Atty: Christopher R.J. Pace): Appellant-PacifiCare Operations, Inc., (Atty: Christopher R.J. Pace): Appellant-United Health Care, (Atty: Kenneth P. Gavsie): Appellant-United Health Group,. United Health Group |
| 07/03/02 | Appellees' Response to Motion to Stay Mandate: Appellee-Price Plaintiffs, (Atty: Harley S. Tropin). Price Plaintiffs |
| 07/10/02 | The motion of Apppellants,...for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED. RB/j/. N/A |
| 07/10/02 | MOT2 (Motion – Court Action) issued. N/A |
| 07/22/02 | CASE CLOSED-Mandate Issued. N/A |
| 07/22/02 | Mandate Issued. N/A |
| 07/22/02 | MDT1 (Mandate—Issuance) issued. cc: Dobbins, M. David. N/A |
| 08/28/02 | Notice of Filing Certiorari-SC# 02-215: Appellant-PacifiCare Health Systems, Inc., (Atty: Christopher R.J. Pace). PacifiCare Health Systems |



| DATE | PROCEEDINGS |
|---|---|
| 10/18/02 | Certiorari Granted-sc# 02-215. N/A |
| 11/21/02 | REC3 (Record—Return) issued. To Clarence Maddox. N/A |

# PACIFICARE OF FLORIDA, INC.

## PHO SERVICES AGREEMENT

This PHO SERVICES AGREEMENT is made and entered into this 1st day of April, 1995, by and between PacifiCare of Florida, Inc. ("PacifiCare of Florida") a Florida corporation, and *SOUTHWEST FLORIDA PHO* ("SWFPHO") with reference to the following facts:

A. PacifiCare is a licensed health maintenance organization ("HMO") in the state of Florida which operates various prepaid health service plans, including Commercial, Medicare and Medicaid plans, which arrange for certain Medical and Hospital Services to be provided to persons who are enrolled as Members in the PacifiCare Health Plan in a manner consistent with the laws of the United States and the State of Florida.

B. SWFPHO is a Physician Hospital Organization which contracts for its providers to provide primary and specialty physician services. It also provides other administrative services which support the delivery of care by its providers.

C. Physician is a duly licensed doctor of medicine or osteopathy under the laws of the State of Florida. Primary Care Physician, (PCP) is experienced in providing Primary Care Services and coordinating Referral Services, as defined below. A specialty physician experienced in providing medical care and coordinating specialty care, as defined below.

D. For purposes of this agreement the term PHYSICIAN shall mean any credentialed physician or other healthcare professional delivering care within the contractual relationship between the SWFPHO and PacifiCare.

E. PacifiCare desires for PHYSICIAN to provide Primary Care/Specialty Services and arrange to serve



members of PacifiCare of Florida, subject to the terms and conditions set forth below.

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein, the parties agree as follows:

F. SWFPHO has authority to enter into an Agreement on behalf of its Affiliated Providers, which may include Primary Care Physicians, Physician Specialists and Ancillary Providers and to legally bind the Affiliated Providers to provide Medical Services to Subscribers in the PHO's service area.

### 1. DEFINITIONS

1.01 AGREEMENT—is this agreement for Primary Care and Specialty Services, dated as herein above stated, including all appropriate attachments and any amendments hereto.

1.02 AHCA—is the Agency for Health Care Administration, an administrative agency of the State of Florida, responsible for administering the state Medicaid program.

1.03 CAPITATION PAYMENTS—are payments made to PCP by PacifiCare on a prepaid basis as set forth in Attachment B for the Covered Services to be provided or arranged under this Agreement.

1.04 COMMERCIAL MEMBER—is an individual who is enrolled in the PacifiCare Commercial Health Plan.

1.05 COPAYMENTS—are charges pursuant to the PacifiCare Health Plan which may be charged to a Member by a Physician at the time of provision of Medical Services, which are in addition to the Capitation and fee-for-service payments made to PHYSICIAN by PacifiCare.

1.06 COVERED SERVICES—are all authorized Medical Services, Hospital Services and other health care services, including Emergency Services and Urgently Needed Services, which are covered benefits under the applicable PacifiCare Health Plan.

1.07 COVERING PHYSICIAN—is a family practitioner, general practitioner, internist or pediatrician licensed by the State of Florida, who has entered into an agreement, either oral or written, with PCP to provide health services to PCP's patients when PCP is not available. A Covering Physician may or may not be under contract with PacifiCare. If PCP fails to identify a Covering Physician as set forth Section 3.05 of this Agreement, PacifiCare may do so on PCP's behalf.

1.08 ELIGIBILITY LIST—is the list of Members to whom PCP is responsible for providing Primary Care Services and arranging Referral Services, which list is provided by PacifiCare to PCP on a monthly basis.

1.09 EMERGENCY SERVICES—are Covered Services which are immediately required as the result of an unexpected and unforeseen disease, illness or injury that could reasonably be expected to result in disability or death if not treated immediately.

1.10 MEDICALLY NECESSARY SERVICES—are Covered Services which are necessary and appropriate for the Member's condition based upon accepted medical and surgical practices in the community at the time care or treatment is provided as determined by PacifiCare's Medical Director.

1.11 MEDICAID—is the federally and state funded program of medical assistance for impoverished individuals who are aged, blind, or disabled or members of families with dependent children established by Title XIX of the Social



Security Act, as amended, which is administered in Florida by the AHCA.

1.12 MEDICAID MEMBER—is a person who is eligible to receive Medicaid benefits and who is enrolled as a Member in the PacifiCare Medicaid Plan. Unless otherwise specified, all references in the Agreement to member shall include Medicaid Member.

1.13 MEMBER—is any person who meets the eligibility requirements for membership in the PacifiCare Health Plan, who is enrolled in such plan, and for whom the applicable premiums have been received by PacifiCare. Members shall include all eligible dependents of the individual named by PacifiCare for coverage under the PacifiCare Health Plan.

1.14 NCQA—is the National Committee for Quality Assurance, an entity responsible for accreditation of Health Maintenance Organizations.

1.15 PACIFICARE COMMERCIAL HEALTH PLAN—is the prepaid health services plan or plans sold by PacifiCare to individuals (excluding individuals eligible for the PacifiCare Medicaid Plan) and employer groups, associations with employer group participation and unions which purchase benefits for the benefit of their employees and dependents, as described in the PacifiCare Medical and Hospital Group Subscriber Agreement and the PacifiCare Medical and Hospital Individual Conversion Subscriber Agreement and attachments, addenda, supplements and periodic amendments thereto. Unless otherwise specified, references to the PacifiCare Health Plan shall include the PacifiCare Commercial Health Plan.

1.16 PACIFICARE HEALTH PLAN—is any one of various managed care products sponsored or administered by PacifiCare or its subsidiaries or affiliates including, without limitation, the PacifiCare Commercial Health Plan and the

PacifiCare Medicaid Risk Plan, and any additional managed care products sponsored or developed by PacifiCare or its subsidiaries or affiliates. PacifiCare will notify SWFPHO of any changes or additions to the managed care products.

1.17 PACIFICARE MEDICAID PLAN—is the prepaid health services plan operated by PacifiCare covering the provision of Medical and Hospital Services to persons eligible to receive Medicaid benefits, as described in the PacifiCare Medicaid Medical and Hospital Subscriber Agreement and attachments, addenda, supplements and periodic amendments thereto. Unless otherwise specified, references to the PacifiCare Health Plan shall include the PacifiCare Medicaid Plan.

1.18 PACIFICARE SERVICE AREA—is the geographic area in which PacifiCare is licensed (i) by the Florida Department of Insurance to offer the PacifiCare Commercial Health Plan, and (ii) by the AHCA to offer the PacifiCare Medicaid Plan.

1.19 PARTICIPATING HOSPITALS—are licensed general acute care hospitals, skilled nursing facilities, extended care facilities, home health agencies, alcoholism and substance abuse centers or any other health care facility licensed by the State of Florida which has entered into a written agreement with PacifiCare to provide Covered Services to Members pursuant to the PacifiCare Health Plan.

1.20 PHYSICIAN—Physician is a duly licensed doctor of medicine or osteopathy under the laws of the State of Florida. Primary Care Physician, (PCP) is experienced in providing Primary Care Services and coordinating Referral Services, as defined below. A specialty physician experienced in providing medical care and coordinating specialty care, as defined below. Physician shall mean PCP and/or Specialist as appropriate.



1.21 PRIMARY CARE PHYSICIAN—is a family practitioner, general practitioner, internist or pediatrician licensed by the State of Florida who has entered into a written agreement with PacifiCare to provide, arrange and coordinate all Covered Services to Members who have selected or been assigned to such Primary Care Physician pursuant to the PacifiCare Health Plan.

1.22 PRIMARY CARE SERVICES—are those Medically Necessary Services generally provided by fully trained primary care medical doctors, in the state of Florida, to all of their patients including those services set forth in Attachment B.

1.23 QUALITY IMPROVEMENT COMMITTEE—is the committee established by PacifiCare which shall establish, maintain and perform quality assurance reviews of Covered Services provided to Members as reasonably required by PacifiCare, the NCQA, the Florida Department of Insurance, the AHCA, the United States Department of Health and Rehabilitative Services, the Agency for Health Care Administration and any other governmental agencies with jurisdiction over PacifiCare or this Agreement.

1.24 REFERRAL SERVICES—are recommended directions of Members from Primary Care Physicians to Specialist Physicians, providers of ancillary services such as laboratory, diagnostic, health education, medical social service, home health care, behavioral health, for the purpose of obtaining Covered Services.

1.25 SCHEDULE OF BENEFITS—means the schedule of Covered Services corresponding to the health services plan under which a particular Member has enrolled. The Schedule of Benefits also lists certain items or services which are excluded or limited. Any service obtained by Members which is excluded or which has exceeded the

limitation for that service is not a Covered Service and will be the responsibility of the Member.

1.26 SPECIALIST PHYSICIAN—is a physician, surgeon or osteopath licensed to practice medicine by the State of Florida (other than a Primary Care Physician) who has entered into a written agreement with PacifiCare to provide Covered Services to Members on a Referral basis.

1.27 URGENTLY NEEDED SERVICES—are Covered Services which are required without delay in order to prevent serious deterioration of a Member's health as the result of an unforeseen illness or injury while the Member is temporarily absent from the PacifiCare Service Area.

1.28 UTILIZATION REVIEW COMMITTEE—is a PacifiCare committee established and maintained to develop a utilization control program outlining procedures for the efficient use of resources, consistent with state and federal law, for the provision of Covered Services. The Utilization Review Committee shall review elective referrals and hospital admissions on a concurrent and prospective basis and Emergency Services, Urgently Needed Services and hospital admissions on a retrospective basis.

1.29 HCFA—is the Health Care Financing Administration, an administrative agency of the United States Government.

1.30 CATASTROPHIC CASE - is any single medical condition, including complications arising from such medical condition, where the total cost of Health Care Services to treat such condition is expected to exceed Seventy five thousand dollars ($75,000.00) per condition.

1.31 MONTHLY HCFA PAYMENT—is the revenue received by PacifiCare each month from HCFA, as determined by HCFA, for the Health Care Services each subscriber is to be provided minus any Benefit Withhold.



1.32 RETIREE SUBSCRIBER—is a subscriber enrolled in the Secure Horizons Retiree Health Plan, who meets all the eligibility requirements for membership in such plan and for whom all applicable premiums have been paid and received by PacifiCare.

## 2. RELATIONSHIP OF PARTIES

2.01 INDEPENDENT CONTRACTOR—The relationship between PacifiCare and PHYSICIAN is an independent contractor relationship. Neither PHYSICIAN nor any employees or agents of PHYSICIAN are employees, or agents of PacifiCare and neither PacifiCare nor any employee or agent of PacifiCare is an employee, or agent of PHYSICIAN. As such, all medical decisions regarding Primary Care Services are rendered solely by PHYSICIAN and not by PacifiCare. None of the provisions of this Agreement shall be construed to create a relationship of agency, representation, joint venture, ownership, control, or employment between the parties.

2.01.01 RELATIONSHIP WITH PACIFICARE OR PHYSICIAN AND AHCA OR THE STATE OF FLORIDA—The relationships between PacifiCare and PHYSICIAN, as a subcontractor of PacifiCare, and the AHCA and the State of Florida are independent contractor relationships. Neither PacifiCare nor PHYSICIAN nor any agents, officers or employees of PacifiCare or PHYSICIAN are agents, officers or employees of the AHCA or the State of Florida. None of the provisions of this Agreement shall be construed to create a relationship of partnership, joint venture or employment between PacifiCare or PHYSICIAN, as a subcontractor of PacifiCare, and the AHCA or the State of Florida.

2.02 RESPONSIBILITIES FOR ACTS AND OMISSIONS—~~IPA~~ [Handwritten: *PHO* [*SEL 3/15/95*] [*DS*]] and PacifiCare acknowledge and agree that each party shall

be responsible for its own acts and omissions under this Agreement and neither ~~IPA~~ [Handwritten: [*PHO* [*SEL 3/16/95*] [*DS*]] nor PacifiCare shall be responsible for the acts or omissions of the other.

2.03 PHYSICIAN-PATIENT RELATIONSHIP—PacifiCare and PHYSICIAN acknowledge and agree that the PHYSICIAN shall maintain the PHYSICIAN-patient relationship with each Member. The PHYSICIAN shall have the sole responsibility for the medical care and treatment of Members under such PHYSICIAN's care. Nothing contained in this Agreement is intended to interfere with such PHYSICIAN-patient relationship.

## 3. DUTIES OF PCP

3.01 PHYSICIAN RESPONSIBILITIES—PHYSICIAN shall provide Primary Care Services, as defined in Attachment A, within the Service Area to Members on PHYSICIAN's Eligibility List. Such Primary Care Services shall be available twenty-four (24) hours per day. PHYSICIAN shall be financially responsible for all Primary Care Services provided to eligible Members for whom PHYSICIAN receives a monthly Capitation Payment from PacifiCare based upon the PacifiCare Eligibility List. PHYSICIAN shall be responsible for determining whether Members are eligible for Primary Care Services on the basis of the Eligibility List supplied to PHYSICIAN by PacifiCare.

3.02. STANDARDS—PCP shall provide Primary Care Services and arrange Referral Services in accordance with generally accepted standards of medical practice and the standards established by the PacifiCare Utilization Review Committee and Quality Improvement Committee. PCP agrees to maintain and demonstrate to PacifiCare upon request, throughout the term of this Agreement, compliance with the following:



3.02.01 Licensure as appropriate under the laws of the State of Florida.

3.02.02. Written assurances that all nurses and other ancillary and para-medical personnel employed by PCP are properly credentialed to practice in the State of Florida.

3.02.03 Medical staff membership and unrestricted applicable clinical privileges for at least one Participating Hospital in the PacifiCare Service Area, unless specifically exempted in writing by PacifiCare.

3.02.04 Maintenance of current Florida Drug Enforcement Agency ("DEA") Registration.

3.02.05 Compliance with the credentialing standards of PacifiCare, by providing, upon request, information concerning PCP's education, training, reference, malpractice liability insurance, and, if applicable, hospital staff status, hospital clinical privileges, and hospital staff reappointment dates. PCP shall notify PacifiCare in writing immediately of any of the following actions taken by or against a PCP: (i) the surrendering, revocation or suspension of a license or a current DEA registration; (ii) any action to restrict, suspend or revoke the PCP's medical staff privileges for a period of time greater than thirty (30) days; (iii) any lapse or material change in PCP's professional liability insurance required by this Agreement; (iv) any indictment, arrest, or conviction for a felony or for any criminal charge related to the practice of PCP's profession; (vii) any other situation which would materially affect PCP's ability to carry out his or her duties and obligations under this Agreement, or which would materially change the representations made in PCP's credentialing application.

3.03 EMPLOYED AND SUBCONTRACTED PHYSICIANS—PCP hereby guarantees and certifies that each employed or subcontracted physician or other licensed non-technician medical provider shall abide by all the terms

and conditions of this Agreement. Further, PCP must notify within 30 days of anticipating the start date of any new employed or subcontracted physician in order to allow PacifiCare adequate time to initiate and complete the credentialing process prior to the physician providing Medical Services to a PacifiCare Member.

3.04 COMPLIANCE WITH CIVIL RIGHTS LAWS—PCP shall comply with Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975 as required by applicable laws or regulations.

3.05 HOSPITAL ADMISSIONS—Whenever PCP determines that a Member on PCP's eligibility list requires Hospital Services that are not Emergency Services, PCP shall arrange for such hospital admission and notify PacifiCare of such admission in advance. Admissions for Emergency Services shall be made to Participating Hospitals, if possible. PacifiCare may require review of certain non-emergency hospital admissions prior to authorization.

3.06 PROVISION OF SERVICES—PCP shall make necessary and appropriate arrangements with Covering Physician(s) to ensure the availability of Primary Care Services to its Members twenty-four (24 hours per day, seven (7) days per week, including arrangements to ensure coverage of its Members after hours or when PCP is otherwise absent, consistent with PacifiCare's access to care guidelines. PCP shall ensure that such covering physician w(s) will adhere to the PacifiCare policies and procedures and the terms of this Agreement as to the services provided to Members and that such covering physician(s) will seek authorization from PacifiCare prior to all referrals and hospitalizations of Members, except for Emergency Services or Urgently Needed Services.



3.06.01 For Primary Care Services or any other services rendered by Covering Physician(s) on behalf of PCP, PCP shall be solely liable to the Covering Physician(s) for the amount and manner in which said Covering Physician(s) will be reimbursed or otherwise compensated; provided, further, that PCP shall ensure that the Covering Physician(s) will not, under any circumstances, bill Members or PacifiCare for Covered Services other than Members for applicable co-payments. Except as aforesaid, PCP hereby agrees to indemnify and hold harmless ~~PacifiCare,~~ [Handwritten: [*SEL 3/16/95*] [*DS*]] the AHCA, and its Members from and against all charges for Covered Services rendered by Covering Physician(s), [Handwriten: *except copays, deductibles, and charges for non-covered services.* [*SEL 3/16/95*] [*DS*]]

3.07 REFERRAL SERVICES—PCP shall arrange for Referral Services to the appropriate participating specialist physicians and Participating Hospitals to Members on PCP's Eligibility List, as medically necessary, and shall follow the clinical progress and provide case management services to those Members until they return to PCP's care.

3.08 REFERRALS TO SPECIALISTS—Physician shall refer Member in need of Referral Services only to Specialist Physicians with whom PacifiCare has a contractual relationship. PacifiCare may require review of certain referrals prior to authorizations. In the event Emergency Services are required, Physician shall comply with Section 3.05 hereof.

3.09 COLLECTION OF CHARGES FROM THIRD PARTIES—PHYSICIAN accepts payment from PacifiCare for Medical Services as provided herein as full payment for such services; however, in the event of third-party liability, Worker's Compensation claims, or other primary insurance coverage, PHYSICIAN shall be entitled to all reimbursement received from such primary sources of payment for all Medical Services. In the event PHYSICIAN receives

payment from such primary sources, PHYSICIAN shall reimburse PacifiCare any amounts paid by PacifiCare to Physician for such services within thirty (30) days after receiving payment from such primary sources. The amount reimbursed by PHYSICIAN to PacifiCare shall not exceed the amount initially paid by PacifiCare. Physician may collect and bill charges from third parties for COB reinsurance and stop loss.

3.10 INSURANCE

3.11 COLLECTION OF CHARGES FROM MEMBERS—PCP shall collect applicable Copayments and deductibles from Members upon rendering Primary Care Services to Members pursuant to the PacifiCare of Florida. With the exception of Copayments, deductibles and charges for non-covered services, PCP shall not, in any event, including, without limitation, non-payment by PacifiCare, insolvency of PacifiCare, or breach of this Agreement, bill, charge, collect a deposit from, seek compensation, remuneration or reimbursement from or have any recourse against Members or persons other than PacifiCare for services provided pursuant to this Agreement.

PCP further agrees that (a) this provision shall survive the termination of this Agreement regardless of the cause giving rise to such termination and shall be construed to be for the benefit of Members and that (b) this provision supersedes any oral or written agreement to the contrary now existing or hereafter entered into between PCP and the Member or persons acting on Member's behalf.

3.12 ADMINISTRATIVE GUIDELINES—PCP agrees to perform its duties under this Agreement in a manner consistent with the reasonable administrative guidelines provided by PacifiCare in its Provider Policies and Procedures Manual. The Provider Policies and Procedures Manual is subject to revision upon thirty (30) days written



notice to PCP by PacifiCare. [Handwritten: *The previous sentence notwithstanding, any provision that substantively alters the PCP's ability to comply with policies or procedures will not go into effect if the PCP provides written notice to PacifiCare or the PHO within 30 days of receiving such revision(s). Such notice by PCP shall include reason(s) why such revision(s) are not acceptable.* [*SEL 3/16/95*] [*DS*]] In the event of conflict between such manual and this Agreement, the terms of this Agreement shall prevail.

3.13 QUALITY IMPROVEMENT PROGRAM AND UTILIZATION MANAGEMENT PROGRAM—PCP shall participate in and comply with the PacifiCare Quality Assurance Program. PCP also agrees to participate with PacifiCare in an ongoing utilization review program, through the Utilization Review Committee, to promote efficient use of resources. PCP shall furnish pertinent sections of a Member's medical records as may be required to implement such programs. PCP shall utilize the criteria for medical care established or approved by PacifiCare's Quality Improvement Committee and Utilization Review Committee.

3.14 CAPACITY REPORTING—PCP will provide to PacifiCare, at the earliest possible time, notice of any significant changes in the capacity of PCP, including a ninety (90) day written notice in the event the PCP is unable or does not wish to serve additional Members. Such notice shall be applicable to all PacifiCare Health Plans.

3.15 DISCLOSURE OF INFORMATION—PacifiCare may use PCP's name, address and telephone number in PacifiCare materials including PacifiCare's provider directory. PCP shall obtain the prior written consent of PacifiCare prior to using PacifiCare's name in its advertising or for any other reason.

3.16 NONDISCRIMINATION—PCP represents and assures that PCP shall not discriminate between PacifiCare

Members and his/her other patients due to race, sex, age, religion, place of residence, health status, or source of payment.

3.17 PROTECTION OF MEMBER—PCP may not impose any limitations on the acceptance of Members for care or treatment that are not imposed on other patients of the PCP. PCP may not require the transfer, discharge, or removal of any Member because of the Member's need for, or utilization of, Medically Necessary Services. Procedures for removal, discharge, or transfer of Members shall be carried out in accordance with the procedures set forth in the Provider Policies and Procedures Manual.

3.18 TRANSFER OF MEMBERS—PacifiCare and PCP shall exercise reasonable efforts in following the procedures for transfer, discharge or removal of Members as set forth in the PacifiCare Policies and Procedures Manual and in discouraging Member transfers except at re-enrollment periods, or when a Member can show just cause for such transfer and PacifiCare agrees to such transfer. Nevertheless, PacifiCare may require transfer of Members assigned to PCP for any reason or PCP may request transfer of Members assigned to him/her by PacifiCare to other Participating Providers if the capacity of PCP is overburdened so that the provision of Medical Services as required by this Agreement is affected.

3.19 VACCINES FOR CHILDREN PROGRAM—PCP participating in the Medicaid plan agrees to participate in the State of Florida's Vaccines for Children Program, a federally-funded and state-operated immunization program, as described in Attachment D to this Agreement.

~~3.20 RECIPROCITY AGREEMENTS SWFPHO agrees to develop agreements among PacifiCare's Participating Medical Groups to assure reciprocity of health care among the Participating Medical Groups for PacifiCare~~



~~Subscribers. SWFPHO shall accept non-emergency or specialty Referrals from such other Participating Medical Groups and such other Participating Medical Groups shall be required to accept non-emergency or specialty Referrals from PHO. Payment for the foregoing Referrals shall be no greater than the Cost of Care Rates.~~ [Handwritten: *Delete* [*SEL 3/16/95*][*DS*]]

4. DUTIES OF SPECIALIST

During the term of this Agreement:

4.01 PHYSICIAN RESPONSIBILITIES—PHYSICIAN agrees to provide Specialty Services on a twenty-four (24) hour basis in the Service Area, Medical Services to Members referred to Physician by a PacifiCare contracted Primary Care Physician. In the event of a call, the Physician covering for a Specialist and rendering care in good faith, said services will be compensated at the rate agreed upon by the original consultant. The preference of PacifiCare is that the patient would be directed to their Primary Care Physician for direction in these circumstances. PHYSICIAN shall be responsible for determining whether Members are eligible for Medical Services.

4.02 STANDARDS—All Medical Services arranged for or provided by PHYSICIAN shall be provided by professional personnel and PHYSICIAN facilities according to generally accepted standards of medical practice and medical management. PHYSICIAN further agrees to provide or arrange for referrals as are necessary, appropriate, and in accordance with generally accepted standards of medical practice to maintain the quality of health care services provided or arranged by PHYSICIAN in accordance with PacifiCare's Quality Assurance Program provided at the time of contracting. PHYSICIAN agrees to maintain and demonstrate to PacifiCare upon request, throughout the term of this Agreement, compliance with the following:

4.02.01. Licensure under the laws of the State of Florida.

4.02.02 Written assurances that all nurses and other ancillary and para-medical personnel employed by PHYSICIAN are properly credentialed to practice in the State of Florida.

4.02.03 Medical staff membership and unrestricted applicable clinical privileges for at least one PacifiCare Participating Hospital in the Service Area, unless specifically exempted in writing by PacifiCare.

4.02.04 Maintenance of current Drug Enforcement Agency ("DEA") Registration.

4.02.05

4.03 REFERRALS BY SPECIALIST PHYSICIAN—When Members require a referral for additional care, PHYSICIAN will so notify the PacifiCare contracting Primary Care Physician that had referred the Member to Physician.

4.04 HOSPITAL ADMISSIONS—Whenever PHYSICIAN determines that a Member requires Hospital Services that are not Emergency Services, PHYSICIAN shall arrange for such hospital admission through PacifiCare and the Member's PacifiCare contracting Primary Care PHYSICIAN. PHYSICIAN shall not serve as the admitting Physician for the Member without prior approval of PacifiCare, except in the event that Emergency Services are required. If PHYSICIAN admits or refers a Member as an inpatient or an outpatient to a hospital for Emergency Services, Physician shall use their best efforts to notify PacifiCare and the Member's PacifiCare contracting Primary Care Physician of such admission within twenty-four (24) hours thereafter or on the first business day thereafter if such admission or referral



occurs on a weekend or holiday. Admissions for Emergency Services shall be made to Contracting Hospitals, if possible.

4.05 COLLECTION OF CHARGES FROM MEMBERS—PHYSICIAN shall collect applicable Copayments and deductibles from Members upon the rendition of service to Members pursuant to the PacifiCare Managed Care Plan. With the exception of Copayments and deductibles and charges for non-covered services delivered on a fee-for-service basis to Members, PHYSICIAN shall in no event including, but not limited to, non-payment by PacifiCare, insolvency of PacifiCare, or breach of this Agreement bill, charge, collect a deposit or attempt to bill, charge, collect, or receive any form of payment from any Member for Covered Medical Services provided pursuant to this Agreement.

A trust agreement has been established with the State based upon membership in order to assure payment to Providers only upon the condition of the HMO's insolvency.

PHYSICIAN shall not maintain any action at law or equity against a Member to collect sums owed by PacifiCare to Physician. Upon notice of any such charge, PacifiCare may terminate this Agreement and take all other appropriate action consistent with the terms of this Agreement to eliminate such charges, including requiring PHYSICIAN to return all sums collected by PHYSICIAN as surcharges from Members or their representatives. Further, the term "surcharges" used herein shall not be defined or construed to mean, include, or encompass deductibles and/or Copayments duly earned by, due or owing to, PHYSICIAN for services rendered during the term of the Agreement. Nothing in this Agreement, however, shall be construed to prevent PHYSICIAN from providing non-covered medical services on a usual and customary fee-for-service basis to Members.

PHYSICIAN's obligations regarding the collection of charges from Members shall survive the termination of this Agreement with respect to Covered Services provided during the term of the Agreement without regard to cause of termination of the Agreement. Except as provided in Paragraph 7.03, these obligations shall not apply to services provided after the Agreement has been terminated.

4.06 COLLECTION OF CHARGES FROM THIRD PARTIES—PHYSICIAN accepts payment from PacifiCare for Medical Services as provided herein as full payment for such services; however, in the event of third- party liability, Worker's Compensation claims, or other primary insurance coverage, PHYSICIAN shall be entitled to all reimbursement received from such primary sources of payment for all Medical Services. In the event PHYSICIAN receives payment from such primary sources, PHYSICIAN shall reimburse PacifiCare any amounts paid by PacifiCare to Physician for such services within thirty (30) days after receiving payment from such primary sources. The amount reimbursed by PHYSICIAN to PacifiCare shall not exceed the amount initially paid by PacifiCare. Physician may collect and bill charges from third parties for COB, reinsurance and stop loss.

4.07 QUALITY ASSURANCE AND UTILIZATION REVIEW PROGRAMS - PHYSICIAN shall participate in and comply with the PacifiCare Quality Assurance Program and PacifiCare or its designated Utilization Review Organization. PHYSICIAN shall furnish such pertinent sections of a Member's medical records as may be required to implement said programs, at no cost to PacifiCare.

4.08 CAPACITY REPORTING—PHYSICIAN will provide to PacifiCare, at the earliest time possible, notice of any significant charges in the capacity of PHYSICIAN including a ninety (90) day written notice in the event



PHYSICIAN is unable or does not wish to serve additional Members.

4.09 RECIPROCITY AGREEMENTS—In the event PHYSICIAN provides Emergency or urgently needed Medical Services to Members, PHYSICIAN agrees to accept as payment for such Services the fees set forth in the schedule[Handwriten:*(s)* [*SEL 3/16/95*][*DS*] attached hereto as Attachment[Handwriten: *(s)]* A [Handwritten: *through H* [*SEL 3/16/95*][*DS*]] and incorporated herein by this reference.

4.10 OTHER CONTRACTUAL COMMITMENTS—PHYSICIAN represents and assures PacifiCare that other contractual commitments do not restrict or impair PHYSICIAN from performing its duties under this Agreement.

4.11 DISCLOSURE OF INFORMATION—PHYSICIAN agrees that PacifiCare may use PHYSICIAN's name, address, and telephone number in the Provider Directory during the term of this Agreement as an indication of PHYSICIAN's willingness to provide Medical Services to Members. Any other use of the PHYSICIAN's name in advertisements would be with the specific permission of said PHYSICIAN. Upon termination of this Agreement, PacifiCare agrees to remove PHYSICIAN's name from all future printings of marketing materials.

4.12 MEDICAL CARE CRITERIA—PHYSICIAN shall utilize the criteria for medical care that is established for approved by PacifiCare's Quality Assurance Program and the PacifiCare designated utilization review organization. The Utilization Review Committee is an PacifiCare Committee composed of PHYSICIANS with specialty physicians represented and chaired by a physician. When there is a dispute between a Primary Care Physician and the Specialty Consultant, the Committee will function in the role of advisor to the Primary Care Physician. If the specialist-proposed plan

for the patient is not endorsed and approved, another referral or course of action will be pursued, relieving the Primary Consultant of further responsibility. The Committee shall meet weekly and urgent approval can be obtained via telephone call to the Chairman or Committee member at any time. It is understood that disputes will be resolved in accordance with Section 9 of this Agreement.

4.13 NONDISCRIMINATION—PHYSICIAN represents and assures that it shall not discriminate between PacifiCare Members and its other patients due to race, sex, age, religion, place of residence, health status, or source of payment.

4.14 COMPLIANCE WITH CIVIL RIGHTS LAWS—PHYSICIAN shall comply with Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975 as required by applicable laws or regulations.

## 5. DUTIES OF PACIFICARE

5.01 ADMINISTRATION—PacifiCare shall provide all administrative services under this Agreement, including quality assurance, utilization review, budgeting, administration of non-PCP claims, coordination of benefits, funds management and compliance with all Federal and State regulatory requirements.

5.02 BENEFIT INFORMATION—PacifiCare shall apprise all Members concerning the type, scope, and duration of benefits and services to which Members are entitled under the PacifiCare Health Plan.

5.03 ASSIST PHYSICIAN—PacifiCare agrees to use its best effort to assist PHYSICIAN in the development and initial implementation of procedures necessary to carry out the terms of this Agreement.



5.04 ADMINISTRATION OF PAYMENTS—PacifiCare agrees to transmit payments to PHYSICIAN in accordance with the terms and procedures set forth in Section 6 herein.

## 6. COMPENSATION

6.01 CAPITATION PAYMENTS TO PCPs - PacifiCare shall make monthly Capitation Payments or other agreed upon payments to PCP as set forth in Attachment B for each Member on PCP's Eligibility List, as complete compensation for PCP's responsibilities described herein, except for applicable Copayments.

6.01.01 CAPITATION ADJUSTMENTS - The Capitation Payment shall be subject to retroactive adjustments by PacifiCare based upon subsequent eligibility determinations of Members, and collection of billed premiums, calculation errors, or computer system errors. Such retroactive adjustments shall be limited to ninety (90) days after the end of the month for which the applicable Capitation Payment applies. [Handwritten: *The PCP will be paid for the full and entire month for each Member even if the Member is under the responsibility of the PCP for a portion, or any portion of the month.* [*SEL 3/16/__*] [*DS*]]

6.02 PAYMENT DUE DATE - if applicable Monthly Capitation Payments shall be payable by PacifiCare to PCP by the fifteenth (15) day of the month for the current month's Covered Services.

6.03 COORDINATION OF BENEFITS - Provider shall follow the procedures set forth in the PacifiCare Provider Policies and Procedures Manual in coordinating benefits.

6.04 COMPENSATION TERMS: METHODS OF PAYMENT TO SPECIALIST - With the exception of any applicable Copayments and deductibles, which may be

properly charged to the Member, PacifiCare shall pay within thirty (30) days of receipt of a properly filed claim, compensation to PHYSICIAN for Covered Medical Services provided by PHYSICIAN in accordance with the terms and conditions set forth as Exhibit A and incorporated herein by this reference. [Handwritten: *A properly completed ("clean") standard HCFA 1500 or successor AMA (American Medical Association) approved claim form will be acceptable by PacifiCare.* [*SEL 3/16/95*] [*DS*]] PHYSICIAN shall accept such payment as complete compensation for PHYSICIAN's responsibilities described herein (except as to applicable Copayments and non-covered services, as provided in Section 3.05 above). In the event it is retroactively determined that a Member is not covered under the PacifiCare Managed Care Plan, PacifiCare shall not retroactively deduct from payments to PHYSICIAN any amount for the provision of Covered Services rendered to said Member. However, PacifiCare may deduct from future payments to PHYSICIAN amounts based on the provision of non-covered services to Members with prior notice. If PHYSICIAN receives payment from another source for services rendered to a Member retroactively determined ineligible, PHYSICIAN shall reimburse PacifiCare the amount PHYSICIAN received from PacifiCare.

6.05 ADEQUACY OF COMPENSATION—PHYSICIAN shall accept the fee-for-service payments from PacifiCare specified herein (plus applicable Copayments) as payment in full for all Medical Services actually provided Members. PHYSICIAN shall make its best effort to submit all bills for Medical Services rendered to Members within thirty (30) days after such services are rendered or at least within an absolute limit of one hundred eighty (180) days for the first ~~six (6)~~ [Handwritten: *twelve (12)* [*SEL 3/16/95*] [*DS*]] months and thereafter within an absolute limit of ~~ninety (90)~~ [Handwriten: *one hundred twenty (120)* [*SEL 3/16/__*]



[*DS*]] days. Regardless of the financial condition of PHYSICIAN during the term of this Agreement, PHYSICIAN shall continue to provide care to Members as provided in this Agreement. Charges by PHYSICIAN to Members for Covered Services rendered by PHYSICIAN are prohibited; upon notice of the existence of any such charge (other than Copayments), PacifiCare shall take appropriate action consistent with the terms of this Agreement to eliminate such charges.

## 7. TERM OF AGREEMENT

7.01 TERM—The initial term of this Agreement shall commence on April 1, 1995 (the "Commencement Date") and shall continue for a period of one (1) year. The term of this Agreement shall be automatically extended for one (1) additional year on each successive anniversary of the Commencement Date of this Agreement, unless terminated by either party as provided in Section 7 below. Each one (1) additional year of automatic extension, the then applicable rates of compensation specified in this Agreement shall apply unless otherwise agreed upon by the parties in writing.

## 8. TERMINATION

8.01 TERMINATION WITHOUT CAUSE—This Agreement may be terminated without cause by either party by providing ninety (90) days prior written notice to the other party. If the Agreement is terminated by PHYSICIAN pursuant to this Section 7.01, PHYSICIAN shall also provide sixty (60) days prior written notice to the Florida Department of Insurance.

8.02 TERMINATION OF AGREEMENT WITH MATERIAL CAUSE—PacifiCare may terminate this Agreement by giving PHYSICIAN thirty (30) days prior written notice in the event of any material breach by

PHYSICIAN of any term of this Agreement. PacifiCare's written Notice of Termination shall state the circumstances constituting cause for termination. PHYSICIAN shall have thirty (30) days from the receipt of such notice to cure or otherwise eliminate the circumstances constituting the cause for termination. If PHYSICIAN fails to cure or eliminate such circumstances within the thirty (30) day notice period, this Agreement shall terminate at the end of such notice period.

8.03 IMMEDIATE TERMINATION—This Agreement may be terminated immediately by PacifiCare in the event of (a) loss of licensure by PHYSICIAN or (b) a determination by PacifiCare, based on reasonable evidence, that the health and well being of Members is jeopardized as the result of continuation of this Agreement. PHYSICIAN may appeal termination by availing him(her)self of the appeals process spelled out in the PacifiCare Provider Policy and Procedures Manual.

8.04 REPAYMENT UPON TERMINATION—Within one hundred and ~~eighty~~ [Handwritten: *twenty* [*SEL 3/16/95*][*DS*]] (120) days following termination of this Agreement, an accounting shall be made of monies due and owing either party and payment shall be forthcoming to settle such balance within thirty (30) days following such accounting.

8.05 CANCELLATION OF AGREEMENT—This Agreement shall be canceled upon issuance of an order by the Florida Department of Insurance pursuant to Section 641.234(3) of the Florida Insurance Code.

8.06 CONTINUING CARE RESPONSIBILITIES—In the event of termination of this Agreement, PCP or Specialists shall continue to be responsible for providing Primary Care Services and arranging Referral Services under the terms of this Agreement to Members on PCP's or



Specialist's Eligibility List during the phase-out period. The phase-out period shall mean the period beginning the termination date of the Agreement and ending the earlier of: (a) the expiration of three (3) months from the date of termination of this Agreement or (b) the effective date of the commencement of services by another contracting primary care physician practicing in the same geographic area and who can effectively provide primary care services to the affected Members. However, if alternate care cannot be arranged for the Member prior to the expiration of the phase-out period for the reason of continuity of care or other medical treatment reasons, PHYSICIAN shall continue to treat Member until PacifiCare has made provision for such alternate care and has notified PHYSICIAN of such in writing. Payment for any continued Primary Care Services provided during or following the phase-out period shall be at the standard fee schedule as described in the attachments for the appropriate Health Plan Services or Products.

Notwithstanding the above or any other provisions to the contrary, PHYSICIAN agrees that in the event PacifiCare ceases operations for any reason, including insolvency, PHYSICIAN shall provide or arrange Covered Services and shall not bill, charge, collect, or receive any form of payment from any Member or have recourse against a Member for Covered Services provided after PacifiCare ceases operations. This continuation of Covered Services obligation shall be for the period for which Health Plan Premiums have been paid, not to exceed a period of thirty (30) days, except for those Members who are hospitalized on an inpatient basis as provided below. In the event PHYSICIAN terminates this Agreement on the basis of PacifiCare's failure to make timely Capitation Payments or PacifiCare ceases operations, PHYSICIAN shall continue to arrange for Covered Services to those Members who are hospitalized on an inpatient basis at the time PacifiCare ceases operations or at the time of

termination of this Agreement until such Members are discharged from the hospital.

PHYSICIAN agrees that the provisions of this Section 7.06 and PHYSICIAN's obligations herein shall survive the termination of this Agreement without regard to the cause for termination of the Agreement and shall be construed to be for the benefit of the Members.

## 9. RECORDS, DATA COLLECTION, CITATIONS, AND RIGHT TO INSPECT

9.01 MAINTENANCE OF RECORDS—PHYSICIAN shall maintain records and information as reasonably necessary for PacifiCare to properly administer the PacifiCare Health Plan and consistent with state and federal law. PHYSICIAN shall maintain books and records of account for all financial transactions pertaining to the delivery of Covered Services to Members, in accordance with general standards for book and record keeping. PHYSICIAN shall maintain all patient medical records relating to Medical Services provided to members, in such form and containing such information as required by applicable state law (and in accordance with the usual and customary practices in the United States), including, without limitation, medical histories, medical charts, records and reports from Specialist Physicians and other providers of Referral Services, hospital discharge summaries, records of Emergency Services and any records necessary to disclose the quality, quantity, appropriateness and timeliness of Covered Services provided to Members under this Agreement.

9.02 PROVISION OF RECORDS—PHYSICIAN shall maintain and provided [Handwritten: [*SEL 3/16/95*] [*DS*]] such records and information to PacifiCare, the NCQA, the AHCA, or the Florida Department of Insurance as may be necessary for compliance by PacifiCare with the provisions of state and federal law and regulations promulgated thereto.



Such records shall be retained by PHYSICIAN for at least five (5) years following the provision of Covered Services. The obligations created by Sections 8.01 and 8.02 shall not terminate upon the termination of this Agreement regardless of the cause giving rise to such termination. Further, upon request with approved patient consent, PHYSICIAN shall provide a copy of all or part of a Members medical record to PacifiCare at no cost as necessary to resolve billing, service, clinical, quality or utilization issues within three (3) business days.

9.03 CONFIDENTIALITY OF RECORDS—PHYSICIAN shall maintain the confidentiality of all Member medical records and treatment information in accordance with all applicable state and federal laws. Where required by law, PHYSICIAN shall obtain specific written authorization from Member prior to releasing Member's medical records.

PHYSICIAN shall establish and maintain procedures and safeguards so that no information pertaining to Members contained in PHYSICIAN's records or obtained from the Florida Department of Insurance or AHCA in carrying out the terms of this Agreement shall be used or disclosed by PHYSICIAN or its agents, officers or employees other than for purposed directly connected with the administration of the PacifiCare Health Plan, or except as provided in Section 1106 of the Social Security Act, as amended, and the regulations promulgated thereunder.

9.04 RIGHT TO INSPECT OR AUDIT—SWFPHO shall provide access at reasonable times upon demand by PacifiCare, the NCQA or any other accreditation organization, the Florida Department of Insurance, the AHCA, or any other governmental regulatory agency responsible for the administration of health care services plans, to periodically audit or inspect the facilities, equipment, books, documents and records relating to the performance of this Agreement including, without limitation,

all phases of professional and ancillary medical care provided or arranged for (subject to the confidentiality restrictions set forth in Section 8.03 and the professional and legal standards applicable to the PHYSICIAN-patient relationship), and financial records pertaining to the cost of operations and income received by PCP for Medical Services rendered to Members. Unless otherwise required by law, PacifiCare shall provide PCP with a forty-eight (48) hour prior written notice of any such inspection or audit. Further, PCP shall comply with any requirements or directives issued by PacifiCare, the NCQA, the AHCA or other governmental authorities as a result of such evaluation, inspection or audit of PCP.

9.05 ENCOUNTER DATA COLLECTION—PCP shall maintain and provide to PacifiCare, on or before the fifteenth (15th) day of each month for the Covered Services provided the previous month, the utilization and encounter data more particularly described in the Provider Policies and Procedures Manual, for the effective management of PacifiCare's Health Plans, as well as any other data required by state or federal law.

9.06 TRANSFER OF MEDICAL RECORDS UPON TERMINATION—Upon the effective date of termination of this Agreement and, if applicable, upon the expiration of the phase-out period of any continuing care obligations, and at PacifiCare's and/or the Member's request, PHYSICIAN shall copy all active Member patient medical files in PHYSICIAN's possession and forward such files to another provider of Medical Services designated by PacifiCare, provided such copying and forwarding is not otherwise objected to by such Members. The copies of such medical files may be in summary form. The cost of copying the patient medical files shall be borne solely by terminating party. PHYSICIAN shall cooperate with PacifiCare in maintaining the confidentiality of such Member medical records at all times.



## 10. GOVERNING LAW, GRIEVANCE PROCEDURE AND ARBITRATION

10.01 GOVERNING LAW—This Agreement and the rights and obligations of the parties hereunder shall be construed, interpreted, and enforced in accordance with, and governed by, the laws of the State of Florida and the United States of America, including, without limitation, the Florida Health Maintenance Organization Act, as amended, and the regulations promulgated thereunder by the Florida Department of Insurance. Any provisions required to be in this Agreement by state or federal law or regulations shall bind PacifiCare and PHYSICIAN whether or not expressly provided in this Agreement.

10.02 MEMBER GRIEVANCES—PacifiCare shall be responsible for resolving Member claims for benefits under the PacifiCare Health Plan and all other claims against PacifiCare. PacifiCare shall resolve such claims utilizing the grievance resolution procedures set forth in the PacifiCare Health Plan and included in the PacifiCare Policies and Procedures Manual.

PHYSICIAN shall assist PacifiCare in the handling of such Member grievance, consistent with the terms of the PacifiCare grievance resolution procedures. In the event an oral or written grievance is presented to PHYSICIAN relating to benefits or coverage under the PacifiCare Health Plan, PHYSICIAN will immediately deliver such grievance to PacifiCare for handling pursuant to the PacifiCare grievance resolution procedures.

PHYSICIAN shall comply with all final determinations made by PacifiCare through the grievance resolution procedure. PacifiCare and PHYSICIAN shall collaborate and cooperate in the investigation and resolution of complaints and grievances that may arise in connection with PHYSICIAN. PHYSICIAN shall submit monthly reports to

PacifiCare for all Medicaid member complaints received by PHYSICIAN, which includes Member name and PacifiCare identification number, date of complaint, nature of complaint, and resolution and date of resolution of complaint.

10.03 ARBITRATION—Any controversy or claim arising out of, or relating to, this Agreement, or the breach thereof, or with respect to any of the documents executed in conjunction herewith, that cannot be resolved through the PacifiCare Provider Grievance Process as spelled out in the PacifiCare Provider Policy and Procedure Manual or that cannot be resolved using the state of Florida's Benefit and Payment Policy, shall be settled by Arbitration in accordance with the commercial rules of the American Arbitration Association. Such arbitration shall occur in Lee County, Florida, unless the parties mutually agree to have such proceeding in some other locale. Civil discovery shall be permitted under the term of Florida law.

Upon submission of a dispute to the American Arbitration Association, PacifiCare and PHYSICIAN agree to be bound by the rules of procedure and decision of the American Arbitration Association. The arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by Florida law, but shall not have the power to award punitive damages. The arbitrator shall prepare in writing and provide the parties an award including factual findings and the legal basis and other reasons on which the award is based. The arbitrator shall not have the power to commit errors of law or legal reasoning. Judgment upon the award rendered may be entered in any court having jurisdiction thereof.

10.04 DISPUTES BETWEEN PHYSICIAN AND MEMBER NOT GOVERNED BY AGREEMENT—Any controversies or claims between PHYSICIAN and Member arising out of PHYSICIAN's performance of this Agreement are not governed by this Agreement. PHYSICIAN and



Member may seek any appropriate or legal action to resolve such controversy or claim deemed necessary. In the event of dispute (not involving professional malpractice) between PHYSICIAN and Member, and upon mutual agreement between PHYSICIAN and the Member, PacifiCare agrees to make available the grievance resolution process described in the applicable Member Agreement for resolution of such dispute provided at the time of contracting. In such instance, the decision of the Member Satisfaction Committee and Board of Trustees shall not be binding upon the parties except upon agreement between PHYSICIAN and Member. Nor shall such grievance be subject to binding arbitration except upon agreement between the parties. Should PHYSICIAN and Member fail to resolve the grievance, PHYSICIAN and Member may seek any appropriate legal action deemed necessary by such party. [Handwritten: *The venue and location for such proceedings shall be in Lee County, Florida, unless both parties agree to have such proceeding in some other locale.* [*SEL 3/16/95*] [*DS*]]

11. NOTICE

11.01 NOTICE—Any notice required to be given hereunder shall be in writing, registered or certified mail, return receipt requested, to either PacifiCare or PHYSICIAN at the addresses listed below or at such other addresses as either PacifiCare or PHYSICIAN may hereafter designate to the other:

To PacifiCare:

PacifiCare of Florida, Inc.
One Alhambra Plaza
Suite 1000, Tenth Floor
Coral Gables, Florida 33134
ATT: General Manager, South Florida

To ~~PHYSICIAN~~: _____

[Handwritten: *PHO* [DS]] _____

_____

Any notice sent by registered or certified mail, return receipt requested, shall be deemed given on the date of delivery shown on the receipt card, or if no delivery date is shown, the postmark date. If any notice is transmitted by facsimile transmission or similar means, the notice shall be deemed served or delivered upon telephone confirmation of receipt of the transmission, provided a copy is also delivered via delivery or mail.

12. MISCELLANEOUS

12.01 CONFIDENTIAL AND PROPRIETARY INFORMATION—PHYSICIAN agrees to maintain confidential (the "Confidential Information"): (a) eligibility lists and any other information containing the names, addresses and telephone numbers of Members which has been compiled by PacifiCare; (b) PacifiCare's administrative service manuals and all forms related thereto; (c) PacifiCare of Florida contracts and the information contained therein; (d) the financial arrangements between PacifiCare and any PacifiCare contracting provider; and (e) any other information compiled or created by PacifiCare which is proprietary to PacifiCare and which PacifiCare identifies as proprietary to PHYSICIAN in writing. PHYSICIAN shall not disclose or use the Confidential Information for its own benefit or gain either during the term of this Agreement or after the date of termination of this Agreement. PHYSICIAN may use the Confidential Information to the extent necessary to perform its duties under this Agreement or upon express prior written permission of PacifiCare. Upon the effective date of termination of this Agreement, PHYSICIAN shall promptly return to PacifiCare the Confidential Information in



his/her possession. The provisions of this section shall not apply to PacifiCare information that is in the public domain.

12.02 SOLICITATION OF PACIFICARE MEMBERS.

12.03 CONFIDENTIALITY OF THIS AGREEMENT—Each party agrees to maintain the terms of this Agreement confidential. Disclosure of the terms of the Agreement shall not be made without the approval of the other party.

12.04 ASSIGNMENT—This Agreement shall not be assigned by PHYSICIAN without the prior written consent of PacifiCare. PacifiCare reserves the right to assign, sell or transfer this agreement to any successor organization or affiliate of PacifiCare.

12.05 INVALIDITY OF SECTIONS—The unenforceability or invalidity of any section or subsection of this Agreement shall not affect the enforceability and validity of the balance of this Agreement

12.06 ATTORNEY'S FEES—If any action at law or suit in equity or arbitration is brought to enforce or interpret the provisions of this Agreement or to collect any monies due hereunder, the prevailing party shall be entitled to reasonable attorneys' fees and reasonable costs, together with interest thereon at the highest rate provided by law, in addition to any and all other relief to which it may otherwise be entitled.

12.07 AMENDMENT—PacifiCare may amend this Agreement by providing thirty (30) days prior written notice via Registered or Certified mail, return receipt requested to PHO. Such amendment shall be binding upon PHO unless PHO provides notice of objection to PacifiCare within the thirty (30) day notice period. If PHO provides such notice of objection within the 30-day notice period, the amendment shall not be effective until the parties amend the Agreement through a written amendment signed by both parties.

12.08 INCORPORATION OF EXHIBITS—All exhibits and attachments to this Agreement are considered part of this Agreement and are hereby incorporated herein.

[Handwritten:

*NOTICES: Notices to PacifiCare shall be sent to ONE ALAHAMBRA PLAZA, Suite 1000, Coral Gables, FL 33134, unless changed in writing with 30 days notice. Notices to PHO shall be sent to Southwest Florida Physician Hospital Organization (SWFPHO) c/o SWFRMC 2727 WINKLER AVE., Ft Myers, FL 33901, unless changed in writing with 30 days notice. [SEL 3/15/95] [DS]]*



IN WITNESS WHEREOF, the parties hereto have executed this Agreement

| | |
|---|---|
| | [Handwritten: *PHYSICIAN HOSPITAL ORGANIZATION (PHO)]* |
| PACIFICARE OF FLORIDA, INC. | ~~PACIFICARE OF FLORIDA, INC.~~ |
| BY: /s/ | BY: /s/ |
| TITLE: [Handwritten: *Vice President, Planning Development*] | TITLE: [Handwritten: *Steven E. Levine, M.D.*] |
| DATE: [Handwritten: *3/17/95*] | DATE: [Handwritten: *3/16/95*] |

~~TAX ID#~~ [Handwritten: *TITLE*]: [Handwritten: *Chairman, SWFPHO*]

SUTTER HEALTH

AND

PACIFICARE OF CALIFORNIA

TERM SHEET

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Sutter Health and PacifiCare of California
Term Sheet

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Sutter Health and
PacifiCare of California

TERM SHEET

This Term Sheet is entered into by and between PacifiCare of California ("PacifiCare") and Sutter Health ("Sutter") on behalf of the Providers listed in Exhibit A. (Sutter and PacifiCare are sometimes referred to collectively as the "Parties").

Recitals

A. Sutter is the parent corporation for all of the Hospital and Medical Foundation Providers listed on Exhibit A and is duly authorized to negotiate and contract on their behalf. Sutter is also the duly authorized attorney-in-fact for those IPAs listed on Exhibit A, except for those IPAs which are subcontracted to a Sutter affiliated Medical Foundation.

B. Subject to Section 3.1.1., below, PacifiCare has existing provider contracts with the Providers listed on Exhibit A (these contracts are individually or collectively referred to as "Provider Contract(s)" or "Provider Services Agreements). The purpose of this Term Sheet is to memorialize the material financial and business terms pursuant to which those Providers listed in Exhibit H will rescind their termination notices and all Providers will continue their contractual relationships with PacifiCare for 2000.

Definitions

1. *Hospital* refers to the Hospitals listed in Exhibit A.

2. *Medical Group* refers to the Medical Foundations and IPAs listed in Exhibit A.

3. *PacifiCare* references any organization owned in whole or part by PacifiCare, its successors, or any



organization which, by contract or other agreement, benefits from any provision of this Term Sheet in the same manner as PacifiCare might benefit.

4. *Provider(s).* For purposes of this Term Sheet only, Provider(s) refers to any of the hospitals, medical foundations and/or aligned IPA's listed on Exhibit A. The use of this definition in this Term Sheet is for convenience only and shall not change the definition of Provider(s) in any of the underlying Provider Contracts.

Article 1

Rates

1.1 *FFS Rates.* PacifiCare shall compensate Providers listed in Exhibit A at the FFS rates and according to the terms set forth in Exhibit B.

1.2 *Medicare Risk Rates.* PacifiCare shall compensate capitated Providers at the rates set forth in Exhibit C and according to the terms set forth in that Exhibit and in Article II below.

Article 2

Terms Related to Medicare Risk Arrangements

2.1 *Pharmacy Risk/Pharmacy Management.* Any pharmacy risk or deficit-sharing arrangement in place with PacifiCare and Provider is terminated as of December 31, 1999. A new Pharmacy Management Program is effective January 1, 2000 and outlined in Exhibit G.

2.2 *Encounter Data.* Provider shall provide to PacifiCare all encounter data in a timely manner and accurate form as required by HCFA regulations and PacifiCare policy. PacifiCare will accept the responsibility for remitting Provider encounter data to HCFA correctly, accurately and timely, and PacifiCare will agree to

indemnify Provider from any material adverse financial impact due to PacifiCare's gross negligence or significant administrative failure.

2.3 *Investigational/Experimental.* PacifiCare does not consider Investigational and experimental procedures covered services. PacifiCare shall be responsible for treatment deemed investigational or experimental when PacifiCare gives approval for such services, except when Investigational/Experimental procedures are reviewed by an external review board and deemed medically necessary by the external review board. In cases deemed medically necessary by the external review board, they become covered services and are the financial responsibility of Medical Group and Hospital.

2.4 *The Division of Financial Responsibility (DOFR).* The DOFR attached at Exhibit D shall be effective January 1, 2000 for all Medicare Risk capitated Providers. Subject to Section C.7 in Exhibit C, PacifiCare shall not change the DOFR attached as Exhibit D without the written consent of Sutter.

2.5 *Low Enrollment Guarantee.*

2.6 *Services to Non-Members.* In the event services are provided to an individual who is not a Member who Provider believed to be a Member based on erroneous or delayed enrollment lists or confirmation of enrollment by PacifiCare, PacifiCare shall be financially liable for all such services provided by Provider prior to the time Provider received notice of that person's ineligibility provided, however, this Section will not apply when Medicare is the primary payor. Additionally, capitation received from another Medicare risk health plan shall be deemed payment. Provider will make best effort attempts, but not more than two



billing cycles, to collect the monies due for such services from the individual or its other coverage prior to billing PacifiCare.

## Article 3

## General Provisions

3.1 *Provider Contracts.* This Term Sheet constitutes an amendment of each of the underlying agreements between PacifiCare and each Provider with respect to Medicare programs, except for SDMC, SSMC, and EMC, where certain changes pertain to the Commercial program, and no other documents are required in order for the provisions in this Term Sheet to be effective. All terms in the Provider Contracts not modified by this Term Sheet shall remain unchanged and in full force and effect. Each Hospital and/or Medical Group hereby recinds the termination of the underlying documents as referenced in Exhibit H.

3.1.1 *MPMC/MPMG/PAMF/SMCSR/SMFNB and Provider Agreements.* Except to the extent modified by this Term Sheet, MPMC and SMCSR shall be bound by the terms set forth in the current SMCS Provider Agreement as if in each case the applicable Sutter Provider and PacifiCare had signed a separate provider agreement in the applicable form. Except to the extent modified by this Term Sheet, MPMG, SMFNB and PAMF shall be bound by the terms set forth in the current SMF Provider Agreement as if in each case the applicable Sutter Provider and PacifiCare had signed a separate provider agreement in the applicable form. Each of these agreements shall be considered a "Provider Contract" for purposes of this Term Sheet.

3.1.2 *ABMC.* With respect to both commercial and Medicare products, ABMC shall only accept capitation for, and be financially liable for providing services to, Members linked to ABMG. Sutter and PacifiCare agree to work in good faith to execute a Provider agreement to replace the existing underlying letter of agreement for ABMC and ABMG by January 31, 2000.

3.2 *Further Negotiations/New Provider Contracts.* The Parties agree to meet and confer in good faith and use best efforts to finalize the terms and conditions of the Provider Contracts by April 1, 2000. The new capitated and fee for service Provider Contracts will be on PacifiCare's model contract form to be negotiated by the Parties. That form shall include the terms of this Term Sheet and only such additional terms as the Parties agree are necessary to implement this Term Sheet; provided, however, that the failure to complete such Provider Contracts shall not affect the binding nature of this Term Sheet.

3.3 *Hierarchy of Provisions.* The PacifiCare Policy and Procedure Manual and Benefits Manual ("Manuals") shall not be used to invalidate the provisions of this Term Sheet or the Provider's individual contract. This Term Sheet will supercede conflicting provisions of the Provider's individual contract with respect to Medicare programs, except for SDMC, SSMC, and EMC, where certain changes pertain to the Commercial program. The terms of those individual contracts and this Term Sheet shall supercede conflicting terms in the Manuals.

3.4 *Material Changes.* In the event of a change(s) in the cost of contracted services, including administrative services, that has a Material financial impact (as



defined below) on a Provider who is financially at risk for such services or on a shared risk pool due to a) changes in Federal or state regulations; b) advances in technology net of improved health care cost benefit or changes in generally accepted patient care guidelines including treatment and disease prevention plans; c) increased pricing for pharmaceutical or chemotherapy drugs; or d) changes in benefit structures or plan types, either Party may initiate the following process:

3.4.1 The Parties shall promptly meet and confer for a period not to exceed thirty (30) days' to determine if the change is Material (based on the definition set forth below) and whether and to what extent the rates set forth in the Provider Contract, including the rates in this Term Sheet, need to be modified to reflect how the Parties shall address the changed cost.

3.4.2 If the Parties cannot agree that the change is material or as to the amount of the change, PacifiCare will be financially liable for such increased costs, or credited for such reduced costs as determined by an independent actuary mutually agreed to and paid by the Parties.

3.4.3 For purposes of this Section, a change is Material if there is a financial impact on the Provider at risk of at least $1.00 pmpm.

3.4.4 This term shall only apply to Medicare programs.

3.5 *SIP Assignment.* The Sutter Independent Physicians (SIP) PacifiCare Provider agreement(s) for all products are assignable to SMF with thirty (30) days' written notice to PacifiCare by SIP, which notice shall include SMF's written agreement to assume such agreements.

3.6 *Affiliate Specific Information.* If Plan intends to publish or release to any third party, including Members, any Provider—specific information or data regarding health outcomes or treatment plans/needs, or data comparing Providers to each other or to any other health care Providers, Plan shall use its best efforts to provide copies of such information to Sutter and the affected Provider at least ninety (90) days' prior to publication or release. Provider shall then have thirty (30) days' to verify the accuracy of that information and, if necessary, provide corrected information to Plan, in which case Plan shall use the corrected information in place of the information originally intended. If the Parties cannot agree on accurate information within thirty (30) days' of the date Provider gives corrected information to Plan, Plan may publish its original information at the end of the ninety (90) day period, provided it will make best efforts to include a notice with that information that Provider disputes the accuracy of the information being published. If either Party cannot meet the timeframe(s) described above, they shall still attempt to exchange the information described and do their best to comply with the spirit of this section.

3.7 *Plan Merger.* In the event that PacifiCare is purchased by, purchases or merges with another entity ("NEWCO") (which transaction is referred to as a "merger" for purposes of this Section), the terms of this Term Sheet shall be binding on the surviving organization (whether PacifiCare or NEWCO) as to any and all PacifiCare Members who were enrolled in an PacifiCare product which is or was subject to this Term Sheet prior to the merger ("PacifiCare Product"), for so long as the PacifiCare Member continues to be enrolled in the PacifiCare product. The Parties further agree that as to any PacifiCare



Member enrolled in an PacifiCare Product, the reimbursement due Providers and other applicable terms shall be as set forth in this Term Sheet for as long as the PacifiCare Member is enrolled in that PacifiCare Product. Furthermore, NEWCO Members shall not be entitled to access the rates in this Term Sheet unless NEWCO Members become enrolled in a PacifiCare Product.

3.8 *Confidentiality.* PacifiCare and Sutter agree to hold in confidence all confidential or proprietary information or trade secrets in confidence including, specifically, the terms of this Term Sheet. Both Parties shall not disclose confidential information without the prior written consent of the other Party.

3.9 *Facility/PPG Risk Arrangements.* The Parties acknowledge that a number of laws and regulations impose certain obligations on PacifiCare with respect to what have traditionally been referred to as "risk sharing arrangements," but which Sutter affiliates now refer to as "care management agreements and/or quality incentive plans (collectively referred to as "incentive arrangements"). If a Facility/Hospital Provider has an incentive arrangement with Medical Group or IPA, it shall notify PacifiCare that such an agreement(s) exists and, upon request, shall provide PacifiCare with all information PacifiCare needs to allow it to comply with Physician Incentive Plan laws and regulations.

3.10 *Interest.* Any amounts due and payable but unpaid as of their due date are subject to the legally permissible interest rate as it pertains to FFS reimbursement.

3.11 *Assignment.* Except as provided in Section 3.5, neither Party may assign rights or delegate duties identified in this Agreement without the prior written consent of the other Party.

3.12 *Effective Date/Term.* The Parties have agreed that the rates set forth in this Term Sheet as well as the terms of the existing Provider Contracts shall commence on January 1, 2000 and shall continue for a period of twelve (12) months not to extend beyond December 31, 2000, unless both Parties mutually agree in writing to extend the term. The Term Sheet and the existing Provider Contracts cannot be terminated by either party without cause, prior to December 31, 2000. The Parties agree to meet at least 120 days prior to December 31, 2000 to discuss a new agreement to be effective January 1, 2001. If any Provider has a continuing care obligation under any Provider Contract covered by this Term Sheet, PacifiCare shall pay for any services provided after December 31, 2000 at 100% of Billed Charges for the Commercial product and 100% of Medicare allowables for the Medicare Risk product.

3.13 *Waiver.* Any failure of a Party to insist upon strict compliance with any term, undertaking or condition of this Agreement shall not be deemed to be a waiver of such term, undertaking or condition. To be effective, a waiver must be in writing, signed and dated by the Parties.

3.14 *Recitals and Exhibits.* The recitals and exhibits are hereby incorporated into this Agreement by this reference.

3.15 *Governing Law.* This Agreement shall be governed by and construed in accordance with the laws of the State of California.

3.16 *Ambiguities.* This Agreement has been negotiated at arm's length and among Parties sophisticated and knowledgeable in the matters dealt with in this Agreement. In addition, each Party has been advised



by experienced and knowledgeable legal counsel. Accordingly, any rule of law (including but not limited to California Civil Code 1654) or legal decision that would require interpretation of any ambiguities in this Agreement against the Party that has drafted it is not applicable and is waived. The provisions of this Agreement shall be interpreted in a reasonable manner to effect the purpose of the Parties.

3.17 *Severance/Effect.* In the event any provisions of this Agreement is declared void by a court or arbitrator, or rendered invalid by any law or regulation, such portion shall be severed from this Agreement, and the remaining provisions shall remain in effect, unless the effect of such severance would be to materially change the substance of the economic relationship created by this Agreement, or to place a Party in material violation of its articles of incorporation or bylaws, in which case, the Agreement may be immediately terminated by either Party.

3.18 *Force Majeure.* In the event of a major disaster, earthquake, epidemic, complete or partial destruction of facilities, war, riot, civil insurrection, disability of a significant part of Provider's personnel, or similar or dissimilar causes not reasonably within the control of Provider, then:

a. If such event delays or makes impractical the rendition of Covered Services pursuant to this Agreement, the affected Provider shall not be liable for any damages resulting from its delay or failure to provide Covered Service; and,

b. Capitation reimbursement shall stop on the first of the month following the event, and shall not be paid until such time as the Provider provides written notice that it is again

able to provide Covered Services. Provider shall be paid the fee-for-service rates applicable in this Agreement.

c. If Medical Group or Hospital is permanently unable to provide a substantial portion of the Covered Services which it has agreed to provide due to such circumstances, Medical Group or Hospital shall have the right to terminate this Agreement upon ten (10) days' written notice.

The Parties shall resolve how to handle labor disruptions as part of the future negotiations described in Section 3.2.

3.19 *Dispute Resolution.* Disputes and breaches of contract will be resolved in accordance with Exhibit E. The California law governing the statute of limitations for claims brought under this Agreement shall apply in all cases.

3.20 *Notices.* Any notice required or desired to be given under this Agreement shall be in writing and shall be sent by certified mail, return receipt requested, postage pre-paid, or overnight courier, addressed as follows:

| | |
|---|---|
| Sutter Health<br>Attn: Sr. Vice President,<br>Managed Care<br>P.O. Box 160727<br>Sacramento, CA 95814 | PacifiCare of California<br>Attn: President<br>5470 Plaza Drive<br>Cypress, CA 98630 |

3.21 *Execution.* By their signatures below, each of the following represent that they have authority to execute this Agreement and to bind the Party(ies) on whose behalf their execution is made.



| SUTTER HEALTH, on it's own behalf, on behalf of its affiliated Hospitals, Medical Foundations and as Attorney-in-Fact for the IPA Providers | PACIFICARE OF CALIFORNIA |
|---|---|
| /s/ | /s/ |
| Signature | Signature |
| [Handwritten: *Snr. VP*] | [Handwritten: *President, Northern Calif.*] |
| Title | Title |
| [Handwritten: *1/16/00*] | [Handwritten: *1-13-00*] |
| Date | Date |

Exhibit A

Participating Providers

A.1 *Tertiary Facilities*

- Sutter Medical Center, Sacramento which includes: Sutter Memorial Hospital, Sutter General Hospital and Sutter Center for Psychiatry (SMCS)
- Alta Bates Medical Center (ABMC)
- Mills-Peninsula Medical Center (MPMC)
- Marin General Hospital (MGH)
- Memorial Hospitals Association (MHA)—Memorial Medical Center—Modesto

A.2 *Acute Facilities* (Acute facilities can and do provide certain tertiary services):

- Eden Medical Center (EMC)
- Memorial Hospital Los Banos (MHLB)
- Novato Community Hospital (NCH)
- Sutter Auburn Faith Hospital (SAFH)
- Sutter Davis Hospital (SDH)
- Sutter Delta Medical Center (SDMC)
- Sutter Medical Center of Santa Rosa (SMCSR)
- Sutter Roseville Medical Center (SRMC)
- Sutter Solano Medical Center (SSMC)
- Sutter Tracy Community Hospital (STCH)

A.3 *Medical Foundations*

- Sutter Medical Foundation (SMF)
  Sutter Medical Group (SMG)
- Sutter Medical Foundation—North Bay (SMFNB)
  Sutter Medical Group of the Redwoods (SMGR)
- Sutter Gould Medical Foundation (SGMF)



- Palo Alto Medical Foundation (PAMF) (See Section C.2 regarding contingency.)
  Palo Alto Medical Clinic (PAMC)

A.4 *IPAs*

- Mills-Peninsula Medical Group (MPMG)
- Alta Bates Medical Group (ABMG)
- Marin IPA (MIPA)
- Central Valley Medical Group (Sub-contracted to SGMF in Stanislaus county) (CVMG)
- Sutter Independent Physicians (SIP)

Exhibit E

Dispute Resolution Process

E.1 *Meet and Confer.* The Parties agree to meet and confer to settle all disputes within thirty (30) days' of written request by either Party. Representatives of the Parties with authority to settle dispute will meet at least once prior to pursuing mediation and/or arbitration. If the Parties cannot agree, they may choose to use mediation as a dispute resolution tool. In this event, Section E.2 shall apply. All discussions held pursuant to this Section E.1 and Section E.2, if applicable, will be for settlement purposes only and subject to confidentiality and non-disclosure agreements which shall be signed by both Parties.

E.2 *Mediation.* The entire mediation process shall be confidential and the privileges and protection of Evidence Code Section 1152.5 shall apply. Prior to commencement of mediation, if requested by either Party or the mediator, the Parties and the mediator shall execute a written confidentiality agreement in accordance with the provisions of Evidence Code Section 1152.5.

If the Parties are unable to resolve the dispute through the meet and confer process, it shall be submitted to mediation before a mediator who will be selected within sixty (60) days' from the last meet and confer (a) by mutual agreement between the Parties, or (b) if the Parties are unable to agree, in accordance with the procedures of JAMS/Endispute. Mediation shall proceed and continue until the earlier of sixty (60) days' after commencement or such time as the dispute is either resolved or the mediator or the Parties agree that mediation should not continue.

At the mediation, each Party shall be represented by persons with authority to negotiate a resolution of the dispute, and may be represented by counsel. The mediator shall determine the format for the meetings. The mediation session shall be private. The entire mediation process shall be confidential and the privileges and protection of Evidence Code Section 1152.5 shall apply.

The fees and expenses of the mediator shall be borne equally by the Parties. All fees, costs and expenses of the mediator and mediation facilities shall be borne equally by the Parties, and all fees, costs and expenses of each Party other than those for the mediator and/or mediation facilities shall be borne and paid for by the Party who incurs them.

E.3 *Arbitration*. Any controversy, dispute or claim arising out of this Agreement which is not resolved pursuant to the Provider Dispute Resolution Procedure specified above shall be resolved by binding arbitration at the request of either Party, in accordance with the Commercial Rules of the American Arbitration Association. Such arbitration shall occur in Sacramento, California, unless the Parties mutually agree to have such proceeding in some other locale. The arbitrator



shall apply California substantive law and federal substantive law where state law is preempted. Civil discovery for use in such arbitration may be conducted in accordance with the provisions of California law, and the arbitrator selected shall have the power to enforce the rights, remedies, duties, liabilities and obligations of discovery by the imposition of the same terms, conditions and penalties as can be imposed in like circumstances in a civil action by a court of competent jurisdiction of the State of California. California Civil Code Section 1283.05, the provisions of California law concerning the right to discovery and the use of depositions in arbitration are incorporated herein by reference and made applicable to this Agreement.

The arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by California law, except that punitive damages shall not be awarded. The arbitrator shall prepare a decision in writing.

Notwithstanding the above, in the event either Medical Group or PacifiCare wishes to obtain injunctive relief or a temporary restraining order, such Party may initiate an action for such relief in a court of general jurisdiction in the State of California. The decision of the court with respect to the requested injunctive relief or temporary restraining order shall be subject to appeal only as allowed under California law. However, the courts shall not have the authority to review or grant any request or demand for damages.

Exhibit H

Termination List

H.1 Sutter Medical Center, Sacramento—Secure Horizons

H.2 Memorial Hospital Association – Secure Horizons

H.3 Alta Bates Medical Center—Secure Horizons

H.4 Sutter Solano Medical Center—Commercial and Secure Horizons

H.5 Sutter Delta Medical Center—Commercial and Secure Horizons

H.6 Eden Medical Center—Secure Horizons

H.7 Sutter Medical Center of Santa Rosa—Secure Horizons (FHP)

H.8 Marin General Hospital – Secure Horizons (FHP)

H.9 Sutter Maternity and Surgery Center—Sutter Santa Cruz Medical Center—Commercial and Secure Horizons (PacifiCare)



# PACIFICARE
# PMG COMMERCIAL
# RISK SERVICES AGREEMENT

This PMG COMMERCIAL RISK SERVICES AGREEMENT (the "Agreement") is made and entered into this first day of December 1995 by and between PACIFICARE OF CALIFORNIA ("PacifiCare"), a California corporation, and SUTTER INDEPENDENT PHYSICIANS ("PMG"), a California Corporation, with reference to the following facts:

A. PacifiCare operates a prepaid health care service plan which arranges for certain Health Care Services to be provided to persons who are enrolled in the PacifiCare Health Plan in a manner consistent with the laws of the United States and the State of California.

B. PacifiCare desires to provide a quality direct service prepaid health delivery system which maximizes the utilization of innovative methods to promote the efficient, economical delivery of health care, and to develop and implement programs of health education and health maintenance for its Subscribers.

C. PMG has as its primary objective the delivery of Medical Services through agreements and active participation with individual physicians, medical groups and/or clients, their physicians and other related health professionals and technicians, all of which are appropriately licensed in the State of California.

D. PMG desires to participate in PacifiCare's prepaid health service delivery system by arranging or providing Health Care Services in coordination with PacifiCare, its Subscribers and participating hospitals on a prepaid basis.

E. PacifiCare and PMG deem it in their best interests to enter into a renewable agreement whereby PMG agrees to provide or arrange Health Care Services to persons who are enrolled at Subscribers in the PacifiCare Health Plan.

NOW THEREFORE, it is agreed as follows:

1. *DEFINITIONS*

Whenever used in this Agreement, the following terms shall have the definitions contained in this Section 1:

*AGREEMENT*—is this PacifiCare PMG Commercial Risk Services Agreement, dated as herein above stated, including all attachments, addenda and amendments hereto.

*CAPITATION PAYMENTS*—are payments made to PMG by PacifiCare on a prepaid basis, as set forth in Attachment C, incorporated in full herein by reference, for the capitated Medical Services to be provided under this Agreement.

*CATASTROPHIC CASE*—is any medical condition, including complications arising from such medical condition, where the total cost of Health Care Services to treat such condition is expected to exceed fifty thousand dollars ($50,000) per condition, regardless of payment source.

*CONFORMANCE REQUEST*—is a written request made by PacifiCare to PMG to correct the performance of an PMG physician or Contracting Provider to conform to the provisions of this Agreement.

*CONTRACTING PROVIDERS*—may be specialist physicians, Vendors, or ancillary providers that are not Member Physicians and who are contracted by PMG to provide non-primary care services to Subscribers on a referral basis

*COPAYMENTS*—are charges pursuant to the PacifiCare Health Plan which may be charged to the Subscriber by the PMG at the time of provision of Health Care Services and which are in addition to the Capitation Payments paid to PMG by PacifiCare.



*COST OF CARE*—is the value of Medical Services as defined in this Agreement and as calculated pursuant to the formula set forth in Attachment A2 incorporated in full herein by reference

*ELIGIBILITY LIST*—is a list of Subscribers designated by Medical Group to whom PMG shall provide or arrange Health Care Services.

*EMERGENCY SERVICES*—are those Health Care Services furnished to a Subscriber for the treatment of acute injury or illness requiring immediate medical attention and which threaten life or limb, or which involve uncontrollable bleeding, or loss of consciousness, or which cannot be delayed without possible serious effects on the health of the Subscriber.

*HEALTH CARE SERVICES*—are all PMG authorized services to which Subscribers are entitled under the PacifiCare Health Plan, including Medical Services, Hospital Services and Emergency Services.

*HOSPITAL*—is an acute care facility (or facilities) located in the PMG Service Area, licensed as an acute care hospital under the laws of the State of California and which has a written agreement with PacifiCare to provide Hospital Services to Subscribers. For purposes of this Agreement, Hospital shall be Sutter Health Central (d.b.a. Sutter Auburn Faith Hospital, Sutter Center for Psychiatry, Sutter Davis Hospital, Sutter General Hospital, Sutter Memorial Hospital and Sutter Roseville Medical Center.

*HOSPITAL DAY*—is any twenty-four (24) hour period commencing at 12:00 a.m., or 12:00 p.m., whichever is used by a Hospital to determine a Hospital Day, during which a Subscriber receives Hospital Services at a Hospital.

*HOSPITAL* SERVICES—are the Health Care Services described in Attachments F, incorporated in full herein by

reference, which Hospitals and other PacifiCare contracting providers shall provide to Subscribers and when PMG shall arrange or coordinate for Subscribers pursuant to the PacifiCare Health Plan.

*PMG*—is the independent practice association identified in the first paragraph of this Agreement and its Member Physicians, all of whom are licensed to practice medicine or osteopathy in the State of California at the PMG Facilities.

*PMG FACILITIES*—are those facilities whose locations are provided to PacifiCare from time to time, where Medical Services shall be available to Subscriber pursuant to this Agreement.

*PMG SERVICE AREA*—is the geographical area within a thirty (30) mile radius of each Hospital Facility as specified in Attachment H. Such radius commences with the address of each designated Hospital Facility and extends for thirty (30) miles over the shortest route using public streets and highways.

*MEDICAL SERVICES*—are the PMG authorized Health Care Services to which Subscribers are entitled under the PacifiCare Health Plan, as described in Attachment F, incorporated in full herein by reference.

*MEDICALLY NECESSARY SERVICES*—are those Health Care Services required by Subscriber which are, in PMG's professional opinion:

(a) Appropriate for the symptoms and diagnosis or treatment of a condition, illness, or injury; and

(b) Provided for the diagnosis, or the direct care and treatment of the condition, illness or injury; and

(c) In accordance with the standards of good medical practice in the PMG Service Area; and



(d) Not primarily for the convenience of the Subscriber, or the Subscriber's physician and surgeon or other provider; and

(e) The most appropriate health service to be provided to the Subscriber; and

(f) Consistent with the medical policies, the Utilization Review Committee, Quality Assurance Committee and PacifiCare Health Plan as identified in the Agreement by attachment and mutually agreed upon by PacifiCare and PMG upon execution of the Agreement.

*MEMBER PHYSICIANS*—are primary care and/or specialist physicians, surgeons and osteopaths licensed to practice medicine in the State of California who have become members of PMG pursuant to the membership requirements set forth in the Bylaws of PMG.

*OUTSIDE PROVIDERS*—are licensed physicians, surgeons, osteopaths, paramedics, hospitals and other licensed health care facilities which provide PMG authorized Health Care Services to Subscribers, but which do not have written agreements with PMG or PacifiCare and which are not Contracting Provider physicians.

*PACIFICARE HEALTH PLANS*—is any one of the various prepaid health service plans operated by PacifiCare as described in the PacifiCare Medical and Hospital Group Subscriber Agreement, the PacifiCare Medical And Hospital Individual Conversion Member Agreement and PacifiCare Medical and Hospital Individual Subscriber Agreement, and attachments, addenda, supplements and periodic amendment thereto, copies of which are attached hereto and Attachment B, incorporated in full herein by reference. For purposes of this Agreement, the PacifiCare Health Plan shall not include PacifiCare's Secure Horizons Plan.

*PACIFICARE INDIVIDUAL PLAN*—is the health plan sold to individuals.

*PARTICIPATING MEDICAL GROUP*—includes PMG and its Members Physicians and is any duly licensed doctor of medicine or osteopathy that has directly, or as a member of a group or association of licensed doctors of medicine or osteopathy, entered into a written agreement with PacifiCare to provide Health Care Services in conjunction with the PacifiCare Health Plan.

*QUALITY ASSURANCE COMMITTEES*—are committees separately established by Medical Group and PacifiCare which shall establish, maintain and perform quality assurance review of Medical Services provided to Subscribers as reasonably required by PacifiCare, the California Department of Corporations, the Office of Qualification and Compliance, the United States Department of Health and Human Services or any other governmental agencies with regulatory or enforcement jurisdiction over PacifiCare or this Agreement

*REFERRALS*—are recommended directions of Subscribers from PMG to physicians, including Contracting Providers, Outside Providers who are physicians and/or consultant physicians, or providers of ancillary services such as lab, x-ray and physical therapy, EKG, EEG, health education, medical social service, home health care, mental health and acute alcohol and drug abuse services, for the purpose of obtaining Health Care Services.

*SUBSCRIBER*—is an individual who is enrolled in a PacifiCare Health Plan, who meets all the eligibility requirements for membership in such plan, who has designated PMG as his or her primary care coordinator and for whom all applicable Subscriber Premiums have been paid and received by PacifiCare. For the purpose of this Agreement, Subscriber shall include all eligible dependents of the individual named by PacifiCare for coverage under a PacifiCare Health Plan



*SURCHARGES*—are additional fees which are not disclosed to Subscriber for Health Care Services and which are not allowable Copayments.

*UTILIZATION REVIEW COMMITTEE*—is a Medical Group committee of at least three (3) Member Physicians which is established and maintained, in accordance with the provisions of Section 3.13 herein, to develop a utilization control program outlining procedures for the efficient use of resources, consistent with state and federal law, for the rendition of Health Care Services. The Utilization Review Committee shall review elective Referrals and hospital admissions on a concurrent and prospective basis and Emergency Services and hospital admissions on a retrospective basis.

*PACIFICARE POINT OF SERVICE*—is a health plan consisting of the PacifiCare Health Plan, plus the Out-of-Network Indemnity Plan.

*OUT-OF-NETWORK INDEMNITY PLAN*—is a supplemental health plan offered as part of the PacifiCare Point of Service by an insurance company or a self-insured employer which provides limited coverage for Out-of-Network Services.

*PACIFICARE IN-NETWORK PLAN*—is the PacifiCare Health Plan that is sold in conjunction with the Out-of-Network Indemnity Plan as part of PacifiCare Point of Service.

*CONVENTIONAL PLAN*—is the PacifiCare Health Plan which is *not* sold as part of the PacifiCare Point of Service.

*IN-NETWORK SERVICES*—are Health Care Services which are provided or arranged by PMG to PacifiCare Point of Service Subscribers pursuant to the PacifiCare Health Plan.

*OUT-OF-NETWORK MEDICAL SERVICES*—are the Health Care Services designated in Attachment F as Medical Services obtained by PacifiCare Point of Service Subscribers which are not authorized by PMG in accordance with PacifiCare's prepaid Health Plan.

*OUT-OF-NETWORK HOSPITAL SERVICES*—are the Health Care Services designated in Attachment F as Hospital Services obtained by PacifiCare Point of Service Subscribers which are not arranged or coordinated by PMG in accordance with PacifiCare's prepaid Health Plan, and which do not qualify as Emergency Services.

*OUT-OF-NETWORK SERVICES*—are Out-of-Network Medical Services and Out-of-Network Hospital Services. Out-of-Network Services are covered in part under the Out-of-Network Indemnity Plan, but are not covered under the PacifiCare Health Plan. PMG shall have no financial responsibility for Out-of-Network Services

*NET PREMIUM*—is the amount of gross premiums billed by PacifiCare each month for coverage of Subscribers designating PMG as their Participating Medical Group, excluding amounts billed by PacifiCare to cover broker commissions and optional supplemental benefits.

*PHARMACY PREMIUM*—is the gross premiums billed by PacifiCare each month for coverage of Subscribers for the outpatient prescription drug benefit.

*VENDOR*—shall mean any provider of additional Health Care Services including, but not limited to, laboratory work, radiology, medical supplies, home health services and outpatient services.

2. *RELATIONSHIP OF PARTIES*

2.01 *PMG PARTICIPATION*—The execution of this Agreement shall qualify PMG to participate in the provision or arrangement of Health Care Services to Subscribers



pursuant to the terms of the PacifiCare Health Plan, as amended from time to time. Subject to Section 12.13, PacifiCare shall notify PMG in writing of any proposed material amendments to the PacifiCare Health Plan, which amendments shall become effective upon sixty (60) days written notice by PacifiCare to PMG, provided PMG has not objected to the amendments in writing to PacifiCare within the sixty (60) day period. PMG approval of such amendments shall not be unreasonably withheld. If PMG provides PacifiCare with reasonable written objection within the sixty (60) day period, such amendments shall have no force or effect on PMG.

2.02 *RESPONSIBILITY FOR OWN ACTS*—Each party shall be responsible for its own acts or omissions and for any and all claims, liabilities, injuries, suits, demands and expenses of all kinds which may result or arise out of any alleged malfeasance or neglect caused or alleged to have been caused by that party or its employees or representatives in the performance or omission of any act or responsibility of that party under this Agreement. In the event that a claim is made against both parties, it is the intent of both parties to cooperate in the defense of said claim and to cause their insurers to do likewise. However both parties shall have the right to take any and all actions they believe necessary to protect their interest.

2.03 *INDEPENDENT CONTRACTOR*—The relationship between PacifiCare and PMG is an independent contractor relationship. Neither PMG nor its employees or agents are employees or agents of PacifiCare and neither PacifiCare nor any employee or agent of PacifiCare is a member, partner, employee or agent of PMG. All medical decisions are rendered solely by PMG and not by PacifiCare. PMG is solely responsible for all Health Care Services provided or arranged by PMG for Subscribers. None of the provisions of this Agreement shall be construed to create a relationship of

agency, representation, joint venture, ownership, control or employment between the parties other than that of independent parties contracting for the purposes of effectuating this Agreement.

3. *DUTIES OF PMG*

3.01 *PMG RESPONSIBILITIES*—PMG agrees to arrange for or provide Health Care Services twenty-four (24) hours a day in coordination with PacifiCare for each Subscriber who has designated PMG as his or her Participating Medical Group. PMG shall be financially responsible for all Medical Services which are specified in Attachment F, incorporated in full herein by reference, and which are provided to Subscribers for whom PMG should receive a monthly Capitation Payment from PacifiCare based upon the PacifiCare provided Eligibility List. PMG shall be responsible for determining whether Subscribers are eligible for Health Care Services on the basis of the most current Eligibility List supplied to PMG by PacifiCare.

3.02 *STANDARDS*—All Medical Services arranged for or provided by PMG and its Member Physicians shall be provided by professional personnel and at physical facilities according to generally accepted standards of medical practice and management in the community. PMG further agrees to provide or arrange for Referrals to physicians and facilities as are necessary, appropriate, and in accordance with generally accepted standards of medical practice in the community in compliance with the standards developed by PacifiCare's Quality Assurance Committee. If PMG contracts with Contracting Provider physicians to provide Medical Services under this Agreement. PMG shall require such physicians to provide PMG with the credentialing information set forth herein. PMG shall obtain and maintain information concerning each Member Physician's and Contracting Provider physician's education, training, references, malpractice liability insurance, hospital staff status, hospital clinical



privileges, and hospital staff reappointment dates. Such information shall be kept in a form prescribed by or acceptable to PacifiCare. Upon written request, at least 72 hours in advance, the credentialing information shall be made available to PacifiCare for review or copying.

PMG acknowledges and agrees that it shall report Member Physicians or Contracting Provider physicians as required by the California Business and Professions Code Section 805 ("Section 805"). PMG further agrees to maintain and demonstrate to PacifiCare upon request compliance with the following:

3.02.01 PMG shall ensure that its Member Physicians and Contracting Provider physicians are licensed by the State of California and have current Drug Enforcement Agency ("DEA") registration. PMG shall immediately notify PacifiCare in writing of any of the following actions taken by or against a Member Physician or Contracting Provider physicians, once PMG has knowledge that such an action has taken place: (i) the surrendering, revocation, or suspension of a license; (ii) the surrendering, revocations, or suspension of current DEA registration; (iii) any filing pursuant to Section 805; (iv) any filing pursuant to the National Practitioner Data Bank; (v) the filing of any malpractice settled claim of more than ten thousand dollars ($10,000); and (vi) a change in hospital staff status or hospital clinical privileges, including any restrictions or limitations.

PMG will use its best efforts to obtain and maintain the information set forth in Paragraph 3.02 and to immediately notify PacifiCare as set forth in this Paragraph 3.02.01.

3.02.02 In the event that it is determined by PacifiCare that PMG does not obtain and maintain the information set forth in paragraph 3.02, PMG agrees to assist

PacifiCare in obtaining credentialing information concerning each Member Physician's and Contracting Provider physician's education, training, references, malpractice liability insurance, hospital staff status, hospital clinical privileges, and hospital staff reappointment dates. PMG shall make best efforts to obtain from each Member Physician and Contracting Provider physician a signed waiver, acceptable to PacifiCare, allowing PacifiCare access to such credentialing information at any acute care hospital or health care facility. If PMG is unable to obtain a signed waiver from a Member Physician or Contracting Provider physician, PMG shall obtain the credentialing information directly from the acute care hospital or health care facility and make such information available to PacifiCare upon request for review and copying.

3.02.03 PMG agrees to provide access to continuing education programs for its Member Physicians in accordance with the standards established by the California Medical Association for continuing education. The content and delivery of such continuing education programs shall be at the discretion and judgment of PMG, in order to maintain high standards for the delivery of Medical Services pursuant to this Agreement. PMG further agrees to gather, correlate, and distribute to its Member Physicians, information regarding professional medical activities and developments which PMG believes may be of assistance in providing Medical Services pursuant to this Agreement.

3.03 *INSURANCE*

3.04 *REFERRALS*—PMG shall refer Subscribers in need of specialty care services only with the approval of the PMG Utilization Review Committee. However, in the event that Emergency Services are required, PMG shall comply with Section 3.05 below.



3.05 *HOSPITAL ADMISSIONS*—whenever PMG determines that a Subscriber on PMG's Eligibility List requires Hospital Services that are not Emergency Services, PMG shall arrange for such Hospital admissions and outpatient surgeries through the PMG's Utilization Review Committee and its developed utilization review program. PMG and its Member Physicians shall comply with this Section 3.05 for all admissions except in the event that Emergency Services are required. If PMG or a Member Physician has knowledge that a Subscriber has been admitted to a hospital due to an out-of-area Emergency, PMG shall notify PacifiCare of such admission within the time frames as required in the PacifiCare Provider Policies and Procedures Manual, attached hereto as Attachment D and incorporated in full herein by reference. All other admissions in-area except for Emergency Services shall be made to Hospital capitated with PacifiCare for the same Subscribers, unless approval by Hospital is obtained. In the event PMG refers a Subscriber to a hospital outside the Sutter Health system, without authorization from Hospital, PMG shall be financially liable for any professional or facility charges incurred as a result of the referral.

3.06 *ELIGIBILITY LIST*—PMG shall accept as patients those Subscribers who are on PMG's Eligibility List provided by PacifiCare to PMG. Member Physicians and PMG shall be entitled to rely on the most current provided list until a new list has been provided to PMG.

3.07 *COLLECTION OF CHARGES FROM SUBSCRIBERS*—PMG shall collect applicable Copayments from Subscribers upon the rendition of Medical Services to Subscribers pursuant to the PacifiCare Health Plan. With the exception of Copayments and charges for non-covered services delivered on a fee-for-service basis to Subscribers, PMG shall in no event, including, without limitation, nonpayment by PacifiCare, insolvency of PacifiCare, or breach

of the Agreement, bill, charge, collect and deposit, or attempt to bill, charge, collect or receive any form of payment, from any Subscriber for Medical Services provided pursuant to this Agreement and for which Subscriber is entitled under the PacifiCare Health Plan in effect for such Subscriber.

PMG shall not maintain any action at law or equity against a Subscriber to collect sums owed by PacifiCare to PMG. Upon notice of any such charge, PacifiCare may terminate this Agreement consistent with the provisions contained in Section 7.01.02 and take all other appropriate action consistent with the terms of this Agreement to eliminate such charges, including, without limitation, requiring PMG and Contracting Providers to return all sums collected as Surcharges from Subscribers or their representatives. Nothing in this Agreement, however, shall be construed to prevent PMG from providing non-covered Medical Services on a usual and customary fee-for-services basis to Subscribers.

PMG's obligations regarding the collection of charges from Subscribers shall survive the termination of this Agreement with respect to Health Care Services provided during the term of the Agreement without regard to cause of termination of this Agreement. Except as provided elsewhere herein, these obligations shall not apply to services provided after the Agreement has been terminated and the phase-out period has expired pursuant to Section 3.09, if applicable.

3.07.01 *Collection of Charges for Out-of-Network Services.* Notwithstanding anything to the contrary in Section 3.07 or elsewhere in the Agreement, if a PMG Member Physician or Contracting Provider provides Out-of-Network Services to a PacifiCare Point of Service Subscriber, PMG shall bill the Out-of-Network Indemnity Plan carrier for such services and agrees to accept full reimbursement at the Cost of Care rates described in Attachment A2 of this Agreement.



3.08 *COLLECTION OF CHARGES FROM THIRD PARTIES*—PMG and Member Physicians accept payment from PacifiCare (plus applicable Copayments) for Medical Services as provided herein as full payment for such Medical Services; provided however, in the event the Subscriber is entitled to payment from another third party or for payment for a Workers' Compensation claim, or from other primary insurance coverage maintained by Subscriber, PMG and Member Physicians shall make no demand upon PacifiCare for reimbursement under the Individual Subscriber Stop Loss Program as specified in Attachment A1 hereto until all primary sources of payment have been pursued and it is determined that full payment cannot be obtained within ten (10) months from the date of the provision of Medical Services.

For purposes of accomplishing the intent of this subsection, PacifiCare hereby assigns to PMG for collection, any claims or demands against third parties for amounts due for Medical Services provided by PMG pursuant to this Agreement, subject to the following conditions:

3.08.01 PMG shall not commence any legal or equitable action against a third party without prior notification to PacifiCare. It is agreed that collection or demand letters consistent with the PacifiCare Provider Policies and Procedures Manual shall not constitute the commencement of legal or equitable action. Under no circumstances, shall PMG commence any legal action against a Subscriber for payment.

3.08.02 PMG shall hold PacifiCare harmless for all actions by PMG pursuant to this Section 3.08.

In the event PMG receives payment from a third party after receipt of payment from PacifiCare, PMG shall reimburse PacifiCare to the extent that the combined amounts received from all payers exceeds one hundred percent (100%) of PMG's usual and customary fee-for-service charges.

3.09 *DUTIES OF PMG UPON TERMINATION DURING PHASE-OUT PERIOD*—Should this Agreement be terminated by PMG pursuant to Sections 7.0.01(a), 7.01.01(b), 7.01.01(c) or 7.01.01(d), PMG shall be released of its obligation to continue to provide or arrange for Health Care Services to Subscribers during the phase-out period as stated in this Section 3.09. If this Agreement is terminated for any other reason by either party or if this Agreement terminates at the end of the Initial Term or any renewal term, PMG shall not be released of its obligation to continue to provide or arrange for Health Care Services to Subscribers during the phase-out period, which phase-out period shall end on the earlier of:

3.09.01 Twelve (12) months from the notification date of termination of this Agreement, or

3.09.02 The date PacifiCare has secured the transfer of Subscribers to another medical group, individual practice association, or physician for further treatment, and has notified PMG of such transfer in writing.

Compensation during the phase-out period shall be at the Cost of Care rates set forth in Attachment A2 hereto and incorporated in full herein by reference.

3.10 *CONTINUING CARE RESPONSIBILITIES*—In the event of termination of this Agreement and the expiration of PMG's duty to provide or arrange Health Care Services during the phase-out period pursuant to Section 3.09, if applicable, PMG and Member Physicians shall continue to provide or arrange for Health Care Services to Subscribers until the effective date of transfer of such Subscribers to another Participating Medical Provider for further treatment and written notice of such transfer has been provided by PacifiCare to PMG. If a Subscriber's care cannot be transferred for the reason of Subscriber hospitalization, continuity of care, or other legally required medical treatment



reasons, PMG shall continue to provide or arrange for treatment for the Subscriber until PacifiCare has made provision for the transfer of such Subscriber to another Participating Medical Provider for further treatment and has notified PMG of such transfer in writing. The payment provisions for any continued treatment after expiration of the phase-out period shall be eighty percent (80%) of the usual and customary fees of the treating physician.

Notwithstanding the above or any other provision to the contrary, PMG agrees that in the event PacifiCare ceases operations for any reason, including insolvency, PMG shall provide or arrange Health Care Services and shall not bill, charge, collect or receive any form of payment from any Subscriber or have any recourse against a Subscriber for Health Care Services provided after PacifiCare ceases operations. This continuation of Health Care Services obligation shall be for the period for which premium has been paid, but shall not exceed a period of thirty (30) days, except for those Subscribers who are hospitalized on an inpatient basis as provided below.

In the event PacifiCare ceases operations or PMG terminates this Agreement on the basis of PacifiCare's failure to make timely Capitation Payments, PMG shall continue to arrange for Health Care Services to those Subscribers who are hospitalized on an inpatient basis at the time PacifiCare ceases operations or PMG terminates this Agreement until such Subscribers are discharged from the hospital. PMG may file a claim with PacifiCare for such services as previously specified in this Section 3.10.

PMG agrees that the provisions of this Section and PMG's and Member Physicians' obligations herein shall survive the termination of this Agreement without regard to the cause of termination of the Agreement, and shall be construed to be for the benefit of the Subscribers.

3.11 *STAFF PRIVILEGES*—PMG agrees to have its Member Physicians seek and obtain (and provide evidence of) staff privileges or other appropriate access to Hospitals where Health Care Services shall be provided to Subscriber by PMG's Member Physicians.

3.12 *ADMINISTRATIVE GUIDELINES*—PMG agrees to perform its duties under this Agreement in a manner consistent with the reasonable administrative guidelines provided by PacifiCare, in its Provider Policies and Procedures Manual, attached hereto as Attachment D and incorporated in full herein by reference. Subject to Section 12.13 herein, PacifiCare shall notify PMG in writing of any proposed material amendments to the administrative guidelines, which amendments shall become effective upon sixty (60) days written notice by PacifiCare to PMG provided PMG has not objected to the amendments in writing to PacifiCare within the sixty (60) day period. PMG approval of such amendments shall not be unreasonably withheld. If PMG provides PacifiCare with reasonable written objection within the sixty (60) day period, such amendments shall have no force or effect on PMG.

3.13 *UTILIZATION REVIEW*—PMG agrees to participate with PacifiCare in an ongoing utilization review program to promote efficient use of resources. The PMG's Utilization Review Committee shall meet as frequently as necessary but at least monthly. The Utilization Review Committee shall keep minutes of the committee meetings, a copy of which shall be made available to PacifiCare upon ten (10) days written notice by PacifiCare to PMG. PMG and PacifiCare shall jointly implement a utilization review system whereby PMG shall notify PacifiCare of any hospital admissions. A member of the PacifiCare medical services staff may participate in PMG's Utilization Review Committee meetings upon ten (10) days written notice. Participation in and/or request of information from Utilization Review Committee meetings shall be limited to PacifiCare members.



3.14 *QUALITY OF HEALTH CARE SERVICES*—PMG agrees to assure quality of Health Care Services by:

3.14.01 Assigning PacifiCare Subscribers only to Member Physicians or Outside Providers meeting quality health care standards.

3.14.02 Inspecting the premises and facilities of its Member Physicians on a regular basis and allowing PacifiCare to participate in such inspections upon ten (10) days written notice.

3.14.03 Utilizing the PacifiCare Quality Assurance Committee's guidelines for physician credentialing.

3.15 *QUALITY ASSURANCE AND REMEDIAL PROCEDURES*—PMG shall cooperate with PacifiCare in the operation of PacifiCare's quality assurance program and PMG shall perform quality assurance review of Health Care Services as brought before PMG internally or from PacifiCare's Quality Assurance Committee. PMG shall establish and maintain a Quality Assurance Committee which shall meet at least quarterly. A member of the PacifiCare medical services staff, in accordance with PMG's policies and procedures, may participate in PMG's Quality Assurance Committee meetings upon ten (10) days written notice. The PMG Quality Assurance Committee shall keep minutes of the committee meetings, a copy of which shall be made available to PacifiCare upon ten (10) days written notice by PacifiCare to PMG. The task of the Quality Assurance Committee may be assumed by the Utilization Review committee described in Section 3.13; however, in such event, the Utilization Review and Quality Assurance Committees must hold separately convened meetings and the minutes of each meeting must be separately maintained.

PMG shall, at the written request of PacifiCare, make available one (1) Member Physician from PMG to attend the PacifiCare Quality Assurance Committee meetings. The

intent of this Section is to have at least one Member Physician from PMG serve for six (6) months on the PacifiCare Quality Assurance Committee during a three (3) year period. PacifiCare shall use best efforts to make available a reasonable stipend for such Member Physician. PMG shall develop written procedures for remedial action whenever it is determined by PacifiCare's Quality Assurance Committee, inappropriate or substandard Health Care Services have been furnished or Health Care Services that should have been furnished have not been furnished. Upon PMG's request, PacifiCare shall assist PMG in the formulation of such remedial procedures.

3.16 *RECIPROCITY AGREEMENTS*—PMG agrees to make best efforts to develop agreements among PacifiCare's Participating Medical Groups to assure reciprocity of health care among the Participating Medical Groups for PacifiCare Subscribers. PMG shall accept non-emerg ncy or specialty Referrals, limited to those services provided by Member Physicians, from such other Participating Medical Groups and such other Participating Medical Groups shall be required to accept non-emergency or specialty Referrals from PMG. Payment for the foregoing Referrals shall be made at the Cost of Care Rates described in Attachment A2.

3.17 *INDIVIDUAL STOP-LOSS PROGRAM*—PMG agrees to participate in and assume the rights and responsibilities of the PacifiCare Stop-Loss Program as defined in Attachment A1, attached hereto and incorporated in full herein by reference.

3.18 *OTHER CONTRACTUAL COMMITMENTS*—PMG represents and assures PacifiCare that contractual commitments with other HMOs, competitive medical plans and health related entities do not restrict or impair PMG from performing its duties under this Agreement.



3.19 *DISSEMINATION OF INFORMATION*—PMG agrees that PacifiCare may use PMG's name, address, telephone number, and a listing of PMG's Member Physicians, and designated Contracting Providers, in any informational material routinely distributed to Subscribers and for other purposes related to the administration of the PacifiCare Health Plan as an indication of PMG's willingness to provide Health Care Services to Subscribers.

Prior to listing or otherwise referencing PacifiCare in any promotional or advertising brochures, media announcements or other advertising or marketing material, PMG shall first obtain the prior subjective consent of PacifiCare. Additionally, prior to the publication of a listing of PMG's Member Physicians and Contracting Providers in any marketing material, PacifiCare agrees to provide PMG with the opportunity to review and modify such listing. PMG agrees to conduct its review and return the listing to PacifiCare within ten (10) working days of receipt of initial listing.

PacifiCare shall agree to educate employers about benefit packages and changes associated with those benefit packages.

3.20 *WRITTEN AGREEMENTS*—PMG shall use best efforts to secure written agreements, consistent with the terms of this Agreement and in compliance with all applicable state and federal law, with all Contracting Providers regularly utilized as a part of PMG's referral system.

3.21 *MEDICAL CARE CRITERIA*—PMG shall utilize the criteria for medical care that is established or approved by PacifiCare's Quality Assurance Committee as a standard reference in determining appropriate lengths of stay for hospitalized Subscribers or appropriate utilization patterns for referral to specialty services.

3.22 *NON-DISCRIMINATION*—PMG represents and assures that Health Care Services are rendered to Subscribers in the same manner as such services are provided to PMG's other patients, except as required pursuant to this Agreement. Subscribers shall not be subject to any discrimination whatsoever by PMG in regards to access to Health Care Services.

3.23 *ACCOUNTS PAYABLE SYSTEM*—PMG agrees to operate its accounts payable system in a manner which assures that providers of authorized Medical Services who are Member Physicians and non-Member Physicians receive payment for Medical Services rendered to Subscribers within forty-five (45) working days of PMG's receipt of an uncontested claim from such Member Physicians and non-Member Physicians. In the event PMG fails to meet the payment timelines discussed in this Section 3.23, in addition to exercising any other remedies it may have under this Agreement, PacifiCare may take actions to assist PMG in operating its accounts payable system including, but not limited to, assuming the obligation of paying PMG's Member Physicians and Non-Member Physicians upon forty-five (45) days written notice and charging PMG an administrative fee for performing such services. Such action shall only be carried out as a result of PMG's failure to cure accounts payable system deficiencies.

3.24 *CATASTROPHIC CASE MANAGEMENT*—PMG agrees that PacifiCare's Medical Director may be involved in the management and coordination of Catastrophic Cases. PMG will fully assist PacifiCare in providing information that may be required in determining the need for a transfer of a Subscriber into PacifiCare's regional centers for the care of Catastrophic Cases including, but not limited to, prompt notification of known or suspected Catastrophic Cases. Detailed procedures for Catastrophic Case management will be mutually agreed upon by the parties based upon PMG's and PacifiCare's determination of the Subscriber's



transferability. Except in unusual circumstances, regional centers for care of Catastrophic Cases shall be sought within the PMG Service Area and surrounding area.

3.25 *CAPACITY REPORTING*—PMG will provide to PacifiCare, at the earliest possible time, notice of any significant changes in the capacity of PMG to provide or arrange for the Health Care Services contemplated by this Agreement (e.g. addition or deletion of Member Physicians), including a ninety (90) day written notice in the event PMG is unable to properly service additional Subscribers. PMG shall still be obligated to provide or arrange for Health Care Services to Subscribers who are with employer groups whom PacifiCare had agreed to enroll prior to ninety (90) days from the effective date of the written notice. PacifiCare shall provide PMG, upon PMG's request, current marketing information within a reasonable period for purposes of determining PMG capacity.

3.26 *REPRESENTATION OF PMG MEMBER PHYSICIANS*—PMG agrees to represent its Member Physicians in matters pertaining to the provision of Health Care Services under this Agreement, and that it has obtained written consent to such representation from its Member Physicians.

3.27 *PERFORMANCE OF MEMBER PHYSICIANS*—PMG agrees: (i) to develop methods for discussion of performance with its Member Physicians, (ii) to assure correction of performance of its Member Physicians consistent with the provisions of this Agreement and state and federal law applicable to the PacifiCare Health Plan, and (iii) to resolve Conformance Requests.

3.28 *WITHDRAWAL OF A PMG FACILITY*—In the event PMG seeks to withdraw one or more of its current PMG Facilities from providing or arranging for Health Care Services to Subscribers under this Agreement, PMG will use its best efforts to notify PacifiCare of such withdrawal in

writing at least sixty (60) days prior to the effective withdrawal date: after the effective date of withdrawal, PMG shall still be responsible to provide or arrange for Health Care Services to the affected Subscribers at the other PMG Facilities.

3.29 *PACIFICARE POINT OF SERVICE CONTROL PROGRAM*—PMG agrees to participate in and have the rights and responsibilities applicable to the PacifiCare Point of Service Control Program as set forth in Attachment A4, attached hereto and incorporated herein.

3.30 *WITHDRAWAL OF A MEMBER PHYSICIAN*—In the event PMG seeks to withdraw one or more of the Member Physicians from providing or arranging Health Care Services to Subscribers under this Agreement, PMG will use its best efforts to notify PacifiCare of such withdrawal in writing at least sixty (60) days prior to the effective withdrawal date. After the effective date of withdrawal, PMG shall still be responsible to provide or arrange for Medical Services to such Subscribers.

## 4. *DUTIES OF PACIFICARE*

4.01 *ADMINISTRATION*—PacifiCare agrees to perform all necessary administrative, accounting, enrollment and other functions consistent with the administration of the PacifiCare Health Plan and this Agreement.

4.02 *BENEFIT INFORMATION*—PacifiCare agrees to apprise all Subscribers concerning the type, scope and duration of benefits and services to which such Subscriber is entitled under the PacifiCare Health Plan.

4.03 *ASSIST PMG*—PacifiCare agrees to assist and cooperate with PMG in the development and initial implementation of procedures necessary to carry out the intent of this Agreement.



4.04 *ADMINISTRATION OF PAYMENTS*—PacifiCare agrees to transmit Capitation Payments and other payments to PMG in accordance with the terms and procedures set forth in this Agreement.

4.05 *STATISTICAL INFORMATION AND PROVISION OF DATA*—PacifiCare agrees to provide PMG with management information and data reasonably necessary to carry out the terms and conditions of this Agreement and for the operation of the PacifiCare Health Plan including monthly Eligibility Lists and monthly capitation worksheets. Furthermore, PacifiCare shall provide, upon request, quarterly reports reflecting the utilization of Health Care Services rendered by PMG. In the event that PacifiCare does not provide the eligibility list to PMG by the fifteenth (15th) day of the month, due to administrative inefficiencies, PacifiCare shall pay PMG $250.00 per day until said eligibility list is delivered to PMG or PMG's designee. In the event that the eligibility list cannot be delivered on or before the fifteenth ($15^{th}$) day of any month due to reasons mutually agreed to be beyond PacifiCare's control, PacifiCare shall notify PMG or PMG's designee and shall not pay $250.00 per day until the eligibility list is delivered.

4.06 *SERVICES RENDERED TO INELIGIBLE SUBSCRIBERS*—PacifiCare agrees to reimburse PMG for those Medical Services set forth in Attachment F which were provided to an ineligible Subscriber if the Subscriber was listed as eligible on the most current Eligibility List provided to PMG by PacifiCare. If PacifiCare is in receipt of a billing to such ineligible Subscriber from PMG and proof of having sent the Subscriber or the Subscriber's legal guardian two (2) bills no less than thirty (30) days apart, PacifiCare will reimburse PMG at the Cost of Care as defined in Attachment A2, rates then in effect for those Medical Services rendered but no greater than one hundred percent (100%) of the still uncollected balance. If subsequent to payment by PacifiCare,

PMG receives any payment from another source for the services, then PMG shall reimburse PacifiCare up to the amount previously received from PacifiCare. If a Subscriber becomes ineligible for benefits under the PacifiCare Health Plan after PMG or Member Physicians have begun treatment of the Subscriber (provided the Subscriber is not hospitalized at the time of becoming ineligible), PMG shall be entitled to make all subsequent charges for its services directly to the Subscriber. If the Subscriber is hospitalized at the time of becoming ineligible, PMG shall be entitled to make charges directly to the Subscriber only for services provided after the Subscriber becomes ineligible.

4.07 *DISSEMINATION OF INFORMATION*—Except as provided above in Section 3.19, prior to listing or otherwise referencing PMG in any promotional or advertising brochures, media announcements or other advertising marketing material, PacifiCare shall first obtain the prior consent of PMG, such consent not to be unreasonably withheld.

4.08 *RETROACTIVE MEMBER CANCELLATIONS AND ADDITIONS*

4.08.01 *Cancellations*. If a Subscriber is retroactively disenrolled, PacifiCare will deduct the overpayment for the appropriate number of months, as determined by PacifiCare, up to a maximum of three (3) months, from the next month's PMG Capitation Payment. If PMG can demonstrate that Health Care Services were provided to such retroactively disenrolled Subscriber, PMG shall receive payment under the provision of Section 4.06.

4.08.02 *Additions*. PacifiCare will use best efforts to discourage retroactive cancellations and additions of Subscribers. However, in the event that such retroactive enrollments occur for reasons beyond PacifiCare's control, including but not limited to, a) open enrollment



periods, b) household move, c) newborn Subscribers, d) PCP assignment changes within the participating Medical Group, PacifiCare shall allow such adjustments and retroactively adjust PMG's capitation as necessary, provided that the retroactive addition period shall not exceed ninety (90) days. In the event of allowable retroactive additions, a capitation payment shall be made to PMG, but PMG shall not be financially responsible for Medical Services not provided or authorized by PMG, or out of area emergency services provided during the retroactive period. PMG will, however, be financially responsible for in area emergency services provided during the retroactive period and all subsequent hospital services if they were provided or authorized by PMG.

4.08.03 *Acute Subscribers*. PacifiCare will not add or transfer Subscribers to PMG until the first day of the second month following the Subscriber's discharge from care for the following criteria, if at the time of request for transfer or addition the member is currently admitted, undergoing care or has an authorization for the following: Inpatient hospitalization, skilled nursing facility care, Home health, I.V. antibiotics, surgical/ trauma follow up, or other acute institutional care.

5. *COMPENSATION*

5.01 *CAPITATION PAYMENTS*—PacifiCare shall make monthly Capitation Payments to PMG as outlined in Attachment C, due and payable on the tenth (10th) day of the month for the current month's Medical Services.

In the event PacifiCare does not pay the monthly Capitation Payment within fifteen (15) days of the aforementioned due date, in addition to the monthly Capitation Payment, PacifiCare shall pay PMG the maximum allowed rate of interest per annum calculated daily until which date the past due sums are received.

5.02 *ADDITIONAL PAYMENTS*—PacifiCare and PMG agree to provide payments to each other in accordance with the terms of the following programs: Mammography Reimbursement Program, Maternity Payment Program and AIDs Stop-Loss Program as specified in Attachments C and E, respectively, incorporated in full herein by reference.

To the extent that each party owes an amount to the other party in the risk programs noted above, PMG agrees that PacifiCare shall combine the results of all applicable risk programs such that one aggregate payment is payable to or receivable from PMG. A fully detailed accounting of the results of each program shall accompany the aggregate payment or notice of amount due.

5.03 *ADEQUACY OF COMPENSATION*—PMG shall accept the payments specified in this Agreement as payment in full for all Medical Services provided Subscribers during each month for which such payments are to be received by PMG. In the event PacifiCare fails to make any payments to PMG as provided herein, whether from PacifiCare's insolvency or otherwise, Subscribers shall not be liable to PMG or its Member Physicians under any circumstances for Health Care Services. Surcharges for Health Care Services provided or arranged by PMG or Member Physicians are prohibited; upon notice of the existence of any such Surcharge, PacifiCare will take appropriate action consistent with the terms of this Agreement to eliminate such Surcharges.

5.04 *OFFSETTING*—Except as may otherwise be specifically provided in this Agreement, PacifiCare shall have the right to offset any and all amounts owed by Medical Group to PacifiCare against amounts, including Capitation Payments, owed by PacifiCare to Medical Group. Before exercising such right, PacifiCare shall provide Medical Group with at least fifteen (15) calendar days prior written notice specifying the offset amount and reasonably demonstrating the reason for the proposed offset. If PacifiCare



receives payment or payment is made prior to the expiration of the fifteen (15) calendar day period or if PMG reasonably demonstrates its objection to the proposed offset, such amount will not be offset. This right to offset shall include, without limitation, PacifiCare's right to offset the following amounts owed to PacifiCare by Medical Group: (i) amounts owed by Medical Group under the incentive programs described in this Agreement and in the Product Attachments; (ii) amounts owed by Medical Group due to overpayments or payments made in error by PacifiCare (limited to one year from the date of service); (iii) amounts owed by Medical Group as a result of claims for Medical Group Services that PacifiCare may pay on behalf of Medical Group; (iv) amounts owed by Medical Group for PMG authorized Covered Services provided outside the Medical Group Service Area; and (v) amounts owed by Medical Group as a result of the outcome of the Member appeals and grievance procedure.

## 6. *TERM OF AGREEMENT*

6.01 *TERM*—The Initial Term of this Agreement shall be for sixty-one (61) months ("Initial Term") and the Commencement Date shall be December 1, 1995. After the Initial Term, a "Year" under this Agreement shall begin on January 1st and end on December 31st. The Term of this Agreement shall be automatically extended for one (1) year on each successive January 1st thereafter unless either party provides the other with written notice of such party's intention not to extend the term no less than one hundred twenty (120) days prior to the January 1 renewal date or until this Agreement is appropriately terminated by either party as provided in Section 7 herein. Upon renewal of the Initial Term and any subsequent term, the then applicable rates of compensation specified in this Agreement shall apply unless otherwise agreed upon by the parties in writing.

## 7. *TERMINATION*

7.01 *TERMINATION OF AGREEMENT WITH MATERIAL CAUSE*—Either party, as appropriate, may terminate this Agreement for material cause as set forth in Section 7.01.01 or 7.01.02 hereof subject to the notice and cure periods set out in Section 7.02 hereof. In the event either party shall desire to so terminate this Agreement, the terminating party shall give written notice of termination stating the actions of the other party constituting material cause for termination.

7.01.01 *CAUSE FOR TERMINATION OF AGREEMENT BY PMG*—The following shall constitute cause for termination of this Agreement by PMG:

a. *Non-Payment*—Failure by PacifiCare to pay Capitation Payments due to PMG hereunder within fifteen (15) days of the Capitation Payment due date or failure by PacifiCare to make any other payments due to PMG hereunder within forty-five (45) days of any such payment's due date.

b. *Revocation of Certification or License*—Revocation by the State of California or the United States Government of any certification or license of PacifiCare necessary for the performance of this Agreement.

c. *Breach of Material Term and Failure to Cure*—PacifiCare's breach of any material term, covenant, or condition and subsequent failure to cure said breach as provided in Section 7.02 hereof. The written notice of termination shall contain specific references as to the breaches which have caused such failure.

d. *Assignment of Rights, Interests and Benefits of the Agreement*—If PacifiCare's assignment of the rights, interests and benefits of this Agreement is not



mutually agreed to by PMG, such disapproval will be provided in writing and contain an explanation for withholding such approval.

7.01.02 *CAUSE FOR TERMINATION OF AGREEMENT BY PACIFICARE*—The following shall constitute cause or termination of this Agreement by PacifiCare:

a. *Financial Failure of PMG*—PacifiCare's reasonable determination of PMG's inability to provide or arrange for Health Care Services as described herein due to the likelihood of PMG's lack of financial resources, other than due to PacifiCare's non-payment of amounts due PMG hereunder. PMG shall have the opportunity to dispute such determination by PacifiCare by providing reasonable evidence and assurances of financial stability and capacity to perform under this Agreement.

b. *Failure to Provide Quality Medical Services*—Failure to maintain the standards set forth in Section 3.02 of this Agreement and such failure is not corrected consistent with the provisions of Section 7.02. The written notice of termination shall contain specific reference to the breaches which caused such failure. PacifiCare reserves the right to withdraw from PMG all or part of its Subscribers if the Health Care Services are not being properly provided or arranged for pursuant to this Agreement and such deficiencies are not corrected consistent with the provisions of Section 7.02 of this Agreement.

c. *Failure to Render Services*—Failure to provide Health Care Services to Subscribers as provided herein. The written notice of termination shall contain specific reference as to the breaches which have caused such failure.

d. *Breach of Material Term and Failure to Cure*—PMG's breach of any material term, covenant or condition of the Agreement and subsequent failure to cure said breach as provided in Section 7.02 of this Agreement. The written notice of termination shall contain specific reference to the breaches which have caused such failure.

7.02 *CURING PERIOD AND TERMINATION DATE*—A party receiving written notice of termination shall have thirty (30) days from the receipt of such notice to cure or otherwise eliminate the circumstances constituting cause for termination. If such party fails to cure or eliminate the circumstances constituting cause for termination within a thirty (30) day period, this Agreement shall terminate at the end of the thirty (30) day period.

7.03 *REPAYMENT UPON TERMINATION*—Within one hundred eighty (180) days of the effective date of termination of this Agreement as provided herein, an accounting shall be made by PacifiCare of monies due and owing either party and payment shall be forthcoming by the appropriate party to settle such balance within thirty (30) days of such accounting. Either party may request an independent audit of such PacifiCare accounting by a mutually acceptable independent certified public accountant and such audit shall be equally paid for by both parties requesting the audit. The parties agree to abide by the findings of such independent audit and appropriate payment by the appropriate party, if any, shall be made within thirty (30) days of such independent audit.

7.04 *TERMINATION NOT AN EXCLUSIVE REMEDY*—Any termination by either party pursuant to this Section 7 is not meant as an exclusive remedy and such terminating party may seek whatever action in law or equity as may be necessary to enforce its rights under this Agreement.



7.05 *TERMINATION WITHOUT CAUSE*—Notwithstanding any other provision of this Agreement, either party may voluntarily terminate this Agreement at any time by giving at least one hundred twenty (120) days prior written notice to the other party.

8. *RECORDS, DATA COLLECTION CITATIONS AND RIGHT TO INSPECT RECORDS*

8.01 *RECORDS*—PMG shall maintain and provide such records and information as reasonably necessary for PacifiCare to properly administer the PacifiCare Medical and Hospital Plan consistent with state and federal law. The duties imposed by this Section 8.01 shall not terminate upon termination of this Agreement, whether by rescission or otherwise, and shall be in effect until the completion of the phase-out period pursuant to Section 3.09.

PMG shall maintain records and provide access to such information to PacifiCare or the California Commissioner of Corporations as may be necessary for the compliance by PacifiCare with the provisions of state and federal law and regulations promulgated thereto, and such records shall be retained by PMG for at least two (2) years following the provision of Health Care Services. This obligation is not terminated upon termination of this Agreement, whether by rescission or otherwise.

8.02 *CONFIDENTIALITY OF RECORDS*—PMG shall safeguard the confidentiality of Subscriber health records and treatment in accordance with all applicable state and federal laws, including, without limitation, the Privacy Act, as implemented by 45 Code of Federal Regulations 5(b) and the regulations promulgated thereunder

8.03 *DATA COLLECTION*—PMG shall maintain and provide to PacifiCare, on a timely basis, the utilization data more particularly described in the PacifiCare Provider Policy and Procedures Manual for the effective management of

PacifiCare's health care delivery system. Among the reports which PMG shall use best efforts to provide to PacifiCare is encounter data which consists of an itemization of PMG's paid claims or pre-paid capitated services provided to PacifiCare Subscribers. This information shall be submitted in a manner consistent with the PacifiCare Policy and Procedure Manual requirements and in a mutually agreed upon format. PacifiCare shall impose a penalty for failure to submit such encounter data, which was reasonably within the control of PMG to submit, within ninety (90) days of the date of service by deducting one percent (1%) of PMG's monthly capitation for each month PMG fails to submit such data.

8.04 *RIGHT TO INSPECT*—PMG shall provide access at reasonable times upon demand by PacifiCare, or any governmental regulatory agency responsible for the administration of health care service plans, to inspect facilities, equipment, books and records relating to the performance of this Agreement, including, without limitation, Subscriber patient records, financial records pertaining to the income received by PMG for Health Care Services rendered to Subscribers. Unless otherwise required by law, PacifiCare shall provide PMG with a seventy-two (72) hour prior written notice of any such inspection.

8.05 *FINANCIAL STATEMENTS*—PMG shall provide to PacifiCare, upon request, copies of its audited annual financial statements, which shall include a balance sheet, statement of income, and a statement of cash flow (the "financial statements") prepared in accordance with generally accepted accounting principles.

8.06 *TRANSFER OF MEDICAL RECORDS UPON TERMINATION*—Upon the effective date of termination of this Agreement and, if applicable, upon the expiration of the phase-out period set forth in Section 3.09, at PacifiCare's request, PMG shall copy all active PacifiCare Subscriber patient medical files in PMG's possession and forward such



files to another provider of Health Care Services designated by PacifiCare, provided such copying and forwarding is not otherwise objected to by Subscribers. The copies of such medical files may be in summary form. The cost of copying the patient medical files shall be borne by Medical Group if Medical Group terminates this Agreement or by PacifiCare if PacifiCare terminates this Agreement. PMG and PacifiCare shall cooperate in maintaining the confidentiality of such confidential and proprietary information and trade secrets at all times.

9. *EXCLUSIVITY*

9.01 *HOSPITAL EXCLUSIVE PROVIDER OF HOSPITAL SERVICES*—In recognition of the need for centralized coordination of Hospital Services to Subscribers to ensure continuity and quality of care, PMG agrees, subject to the limitations stated below, to require its individual physicians to use Hospital as its exclusive provider of Hospital Services for all Subscribers eligible to receive Hospital Services in the PMG Service Area. This exclusivity provision is subject to the following exceptions:

9.01.01 *Emergency Services*—Subscribers admitted for Emergency Services through other hospitals, whether in or out of the PMG Service Area.

9.01.02 *Unavailable Hospital Services*—Subscribers requiring Hospital Services not available at Hospital, including specialty Hospital Services and those which cannot be provided due to ethical principles of Hospital.

9.01.03 *Unauthorized Admissions*—Unauthorized Subscriber admissions to health care facilities within the PMG Service Area for Hospital Services.

9.01.04 *Subscriber Requests for Treatment at Other Facilities*—PMG may grant Subscriber requests for treatment or for transfer to another facility due to

Medical Necessity or impairment of the Hospital/ Subscriber relationship. PMG shall exercise reasonable efforts in discouraging such Subscriber requests unless Subscriber can show just cause for such request. Prior to any transfer, the PMG must deem the transfer to be medically safe and the Hospital must approve payment for services.

9.02 *UTILIZATION OF PMG BY PACIFICARE*—Nothing in this Agreement shall be construed to require PacifiCare to assign any minimum or maximum number of Subscribers to PMG, nor to require PacifiCare to utilize the Health Care Services of PMG for any or all Subscribers in the PMG Service Area.

10. *GOVERNING LAW AND DISPUTE RESOLUTION*

10.01 *GOVERNING LAW*—This Agreement and the rights and obligations of the parties hereunder shall be construed, interpreted, and enforced in accordance with, and governed by, the laws of the State of California, and the United States and all regulations promulgated pursuant thereto. Any provisions required to be in this Agreement by any of the above Acts and regulations shall bind PacifiCare and PMG whether or not expressly provided in this Agreement

10.02 *DISPUTES BETWEEN PMG AND SUBSCRIBER NOT GOVERNED BY AGREEMENT*—Any controversies or claims between PMG and Subscriber arising out of PMG's performance of this Agreement are not governed by this Agreement. PMG and Subscriber may seek any appropriate legal action to resolve such controversy or claim deemed necessary.

In the event of dispute between PMG and a Subscriber and upon mutual agreement between PMG and such Subscriber, PacifiCare agrees to make available the Subscriber Grievance



Resolution Process described in the PacifiCare Health Plan Agreement for resolution of such dispute. In such instance, the decision of the PacifiCare Subscriber Satisfaction Committee and Board of Directors shall not be binding upon the parties except upon agreement between PMG and the Subscriber. Nor shall such grievance be subject to binding arbitration except upon agreement between the parties. Should PMG and Subscriber fail to resolve the grievance, PMG and Subscriber may seek any appropriate legal action deemed necessary by such party.

10.03 *PAYMENT DISPUTES BETWEEN PMG AND CONTRACTING PROVIDER PHYSICIANS*—In the event PMG fails to make a payment to a Contracting Provider physician within sixty (60) days of the submission of the bill by Contracting Provider physician to PMG and the validity and the amount of the submitted bill are undisputed, PacifiCare may, after fifteen (15) day prior notification, elect to pay the Contracting Provider physician on behalf of PMG and deduct such payment from PMG's next monthly Capitation Payment.

Should a dispute concerning a claim for payment for Medical Services rendered to Subscribers arise between PMG and a Contracting Provider physician who is a Participating Medical Provider, PMG or the Contracting Provider physician, may submit a written complaint to PacifiCare. The complaint shall describe the disputed claim and the basis for the amounts claimed and include the applicable written agreement between PMG and the Contracting Provider physician. PacifiCare shall investigate the complaint and make a determination of whether or not the claim is valid and should be paid. In the event PacifiCare determines that PMG owes any amount to Contracting Provider physician, PMG shall make such payment within thirty (30) days of PacifiCare's determination. If PMG fails to pay the amount due within this thirty (30) day period,

PacifiCare may deduct the amount owed from PMG's next monthly capitation payment. This amount will temporarily be placed in an account (the "Claims Dispute Account") which shall be established by PacifiCare. If PMG or Contracting Provider physician wishes to contest PacifiCare's determination, either may do so by initiating an action for binding arbitration and notifying PacifiCare of such initiation within thirty (30) days of PacifiCare's determination. If PMG or Contracting Provider physician fails to request arbitration within thirty (30) days or if the arbitration affirms PacifiCare's decision that amounts are owing from PMG to Contracting Provider physician, PacifiCare shall release from the Claims Dispute Account the amount owing the physician. If the arbitration results in a decision that no money or a lesser amount than was determined by PacifiCare is owing to Contracting Provider physician, PacifiCare shall release to PMG the amounts which were erroneously withheld from PMG's Capitation Payment.

In the event this Agreement has been terminated prior to PacifiCare's investigation and written determination and PacifiCare's investigation results in a determination that PMG owes money to Contracting Provider physician, PacifiCare may elect to pay Contracting Provider physician on behalf of PMG and seek reimbursement from PMG through arbitration as described in this Section.

10.4 *ARBITRATION*—Any controversy, dispute or claim arising out of the interpretation, performance, or breach of this Agreement which is not resolved pursuant to the Provider Dispute Resolution Procedure specified above shall be resolved by binding arbitration at the request of either party, in accordance with the Commercial Rules of the American Arbitration Association. Such arbitration shall occur in Sacramento, California unless the parties mutually agree to have such proceeding in some other locale. The arbitrators shall apply California Substantive law and federal



substantive law where state law is preempted. Civil discovery for use in such arbitration may be conducted in accordance with the provisions of California law, and the arbitrator(s) selected shall have the power to enforce the rights, remedies, duties, liabilities and obligations of discovery by the imposition of the same terms, conditions, and penalties as can be imposed in like circumstances in a civil action by a court of competent jurisdiction of the State of California. The provisions of California law concerning the right to discovery and the use of the depositions in arbitration are incorporated herein by reference and made applicable to this Agreement.

The arbitrators shall have the power to grant all legal and equitable remedies and award compensatory damages provided by California law, except that punitive damages shall not be awarded. The arbitrators shall prepare in writing and provide to the parties an award including factual findings and the legal reasons on which the award is based. The arbitrators shall prepare in writing and provide to the parties an award including factual findings and the legal reasons on which the award is based. The arbitrators shall not have the power to commit errors of law or legal reasoning.

Notwithstanding the above, in the event either Medical Group or PacifiCare wishes to obtain injunctive relief or a temporary restraining order, such party may initiate an action for such relief in a court of general jurisdiction in the State of California. The decision of the court with respect to the requested injunctive relief or temporary restraining order shall be subject to appeal only as allowed under California. However, the courts shall not have the authority to review or grant any request or demand for damages.

11. *NOTICE*

11.01 *NOTICE*—Any notice required to be given hereunder shall be in writing either delivered personally or sent

by registered or certified mail, return receipt requested, to either PacifiCare or PMG at the addresses listed below, or at such other addresses as either PacifiCare or PMG may hereafter designate to the other.

To PacifiCare:
PacifiCare of California
P.O. Box 6006
Cypress, California 90630-0006
Attention: President

To Sutter Independent Physicians:
Sutter Independent Physicians
~~3800 L Street~~ [Handwritten: *10860 Grid Center Drive, 3rd Floor*]
Sacramento, CA ~~95816~~ [Handwritten: *95670]*
Attention: ~~Chief Executive Officer~~ ~~Administration~~ [Handwritten: *Chief Operations Officer*]

Copy to:
Sutter Health Managed Care Department
P.O. Box 160727
Sacramento, CA 95816
Attention: Contract Manager

All notices shall be deemed given on the date of delivery if delivered personally.

12. *MISCELLANEOUS*

12.01 *PROTECTION OF SUBSCRIBER*—PMG may not impose any limitations on the acceptance of Subscribers for care or treatment that it does not impose on other patients of the PMG. Neither PacifiCare, PMG nor Hospitals may request, demand, require or seek directly or indirectly the



transfer, discharge, or removal of any Subscriber for reasons of Subscriber's need for, or utilization of, Medically Necessary Health Care Services, except in accordance with the procedures established for such action. PMG shall not refuse or fail to provide Medically Necessary Health Care Services to any Subscriber. Procedures for removal, discharge or transfer of Subscribers shall be mutually agreed upon between PMG and PacifiCare consistent with the PacifiCare Health Plan.

12.02 *OTHER AGREEMENTS*—Nothing in this Agreement shall prevent PacifiCare and PMG from contracting with each other for provision of services not covered by this Agreement.

12.03 *GOVERNING LAW*—PacifiCare, PMG and this Agreement are subject to the laws of the State of California and the United States of America, specifically: the California Knox-Keene Act and the regulations promulgated thereunder by the California Department of Corporations, and the Health Maintenance Organization Act of 1973 and the regulations promulgated thereunder by the United States Department of Health and Human Services.

PMG shall maintain such records and provide such information to PacifiCare or the California Commissioner of Corporations as may be necessary for the compliance by PacifiCare with the provisions of the above Acts and regulations, and such records shall be retained by PMG or at least two (2) years following the provision of Health Care Services. This obligation is not terminated upon termination of this Agreement, whether by rescission or otherwise.

Any provisions required to be in this Agreement by any of the above Acts and regulations shall bind PacifiCare and PMG whether or not expressly provided in this Agreement.

12.04 *REFUSAL BY PHYSICIAN*—PMG of any of its Member Physicians may refuse Health Care Services to a Subscriber assigned to PMG for violent, disruptive, or non-compliant behavior with Member Physicians and/or staff of any physician subject to prior approval by PacifiCare for which approval shall not be unreasonably withheld. It shall remain the responsibility of PMG to assure that Subscribers who are assigned to PMG and who are not violent, disruptive, or non-compliant with Member Physicians and or staff of any physician, receive Health Care Services consistent with the terms of this Agreement.

12.05 *CONFIDENTIAL AND PROPRIETARY INFORMATION*

12.05.01 *Information Confidential and Proprietary to PacifiCare*—PMG acknowledges that all PacifiCare Subscribers participating in a PacifiCare Health Plan individually or through an employer group and receiving Health Care Services shall be Subscribers of PacifiCare. Subscriber and employer group information shall include, without limitation, the names, addresses and telephone numbers of all Subscribers, the names, addresses and telephone numbers of employer group employees responsible for health benefits and the officers and directors of such employer groups; member, employer and administrative service manuals and all forms related thereto; and records, files (other than patient medical files) and lists contained in PMG and PacifiCare files.

PMG acknowledges that all such information is confidential and proprietary to PacifiCare and that such Subscriber and employer group information contains valuable trade secrets of PacifiCare.



All PacifiCare Subscriber agreements and the information contained therein regarding PacifiCare, PMG, employer groups, Subscribers or the financial arrangements between a hospital, PMG and PacifiCare is confidential and proprietary to PacifiCare.

PMG shall maintain all Subscriber information and other PacifiCare trade secret information confidential. PMG shall not disclose or use any confidential and proprietary information for its own benefit or gain either during the term of this Agreement or after the date of termination of this Agreement; provided, however, that PMG may use the name, address and telephone number of other medical information of a PacifiCare Subscriber if Medically Necessary for the proper treatment of such Subscriber or upon express prior written permission of PacifiCare.

12.05.02 *Information Confidential and Proprietary to PMG*—All PMG information shall be considered proprietary to PMG and confidential and may contain trade secrets of PMG ("PMG Information"). PacifiCare shall maintain PMG Information confidential. PacifiCare shall not disclose or use any PMG Information for its own benefit either during the term of this Agreement or after the effective date of termination of this Agreement without the consent of PMG. PacifiCare shall cooperate with PMG in maintaining the confidentiality of PMG Information at all times.

12.05.03—*Solicitation of PacifiCare Subscribers or Employer Groups*

12.06 *CONFIDENTIALITY OF THIS AGREEMENT*—To the extent reasonably possible, each party agrees to maintain this Agreement as a confidential document and not to disclose the Agreement or any of its terms without the approval of the other party.

12.07 *ASSIGNMENT*—This Agreement and the rights, interests and benefits hereunder shall not be assigned, transferred, pledged, or hypothecated in any way by PMG or PacifiCare and shall not be subject to execution, attachment or similar process, nor shall the duties imposed herein by subcontracted or delegated without the prior written consent of other party. However, PacifiCare and PMG may assign this Agreement and its rights, interests and benefits hereunder to any entity which has at least majority control of said party, or to any entity of which PacifiCare or PMG has at least majority control, or to an affiliate, upon ninety (90) days' prior written consent to the other party.

12.08 *INVALIDITY OF SECTIONS OF THIS AGREEMENT*—The unenforceability or invalidity of any paragraph or subparagraph of any section or subsection of this Agreement shall not affect the enforceability and validity of the balance of this Agreement.

12.09 *WITHDRAWAL OF SUBSCRIBERS BY PACIFICARE*—PacifiCare reserves the right to withdraw from PMG all or part of the Subscribers from PMG whose Health Care Services are not being properly provided pursuant to this Agreement. PacifiCare shall provide written notice to PMG of such withdrawal and the reasons therefore. PacifiCare shall then allow PMG ninety (90) days from the date of such notice to correct deficiencies. PacifiCare and PMG shall work together to resolve such noted deficiencies. If such deficiencies are not corrected to PacifiCare's satisfaction within said period, PacifiCare may withdraw its Subscribers as provided in this Section 12.09 and remove PMG's name from PacifiCare's marketing materials.

12.10 *TRANSFER OF SUBSCRIBERS*—Subscriber requests for transfer from PMG shall be in writing and subject to approval by PacifiCare based on the criteria set forth in the PacifiCare Policy and Procedures Manual. PacifiCare reserves the right to transfer a Subscriber for any reason.



PMG may request transfer of Subscribers for cause, or if the capacity of PMG is over burdened such that the provision of Medical Services as required pursuant to this Agreement adversely is affected.

12.11 *CAPTIONS*—Captions in this Agreement are descriptive only and do not affect the intent or interpretation of the Agreement.

12.12 *AMENDMENT*—This Agreement may be amended or modified only by mutual written consent of the parties. Notwithstanding the foregoing sentence, PacifiCare may amend this Agreement upon sixty (60) days written notice to PMG in order to maintain compliance with applicable federal and state laws. Any such amendment which affects a legally required duty or responsibility of PMG and has a material adverse economic effect upon PMG as reasonably demonstrated by PMG to PacifiCare, shall be subject to the provisions of Section 12.13 below.

12.13 *MODIFICATIONS OF THIS AGREEMENT AND/OR PACIFICARE PROVIDER AND PROCEDURES MANUAL AND/OR PACIFICARE HEALTH PLAN*—Anything to the contrary herein notwithstanding, in the event of any material modification of this Agreement and/or the PacifiCare Provider and Procedures Manual and/or the PacifiCare Health Plan, including the benefit plan, that (i) affects a material duty or responsibility of PMG, and(ii) causes a material economic detriment to PMG. PMG and PacifiCare shall seek to agree to an amendment to this Agreement which satisfactorily addresses the effect on PMG's material duty or responsibility and reimburses the material economic detriment caused to PMG. In the event such an agreement cannot be reached within sixty (60) days after the date PacifiCare gives PMG written notice of such modification, such modification shall not be effective.

12.14 *TERMS; SECTIONS*—Unless otherwise indicated, all terms in any appropriate attachments, addendum's and amendments hereto shall have the same meaning attributed to such terms in the body of this Agreement and reference to section numbers are to the appropriate sections of this Agreement.

12.15 *PMG's AUTHORIZED REPRESENTATIVE*—Unless otherwise indicated in writing to PacifiCare, PMG warrants and authorizes its Chief Executive Officer to act as its fully authorized representative to represent PMG and Member Physicians in this Agreement and to receive any and all communications and notices hereunder.

12.16 *WAIVER*—Any failure of a party to insist upon strict compliance with any term, undertaking, or condition of this Agreement shall not be deemed to be a waiver of such term, undertaking or condition. To be effective, a waiver must be signed and dated by the party executing the waiver.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in _____, California, on _____, 19__.

| | |
|---|---|
| PACIFICARE OF CALIFORNIA | SUTTER INDEPENDENT PHYSICIANS |
| BY: /s/ _____ | BY: /s/ _____ |
| TITLE: [Handwritten: *Managing Director*] _____ | TITLE: President, SIP Board |
| | DATE: 9/17/98 _____ |
| DATE: [Handwritten: *10/20/98*] _____ | |



UNITED HEALTHCARE OF FLORIDA, INC.
MEDICAL GROUP PARTICIPATION AGREEMENT

THIS AGREEMENT, effective [handwritten: 8/1/98], 1998 ("Effective Date"), is between United HealthCare of Florida, Inc. ("Plan") and Community Orthopedics & Pain Management, Inc. ("Medical Group") and sets forth the terms and conditions under which Medical Group shall participate in one or more networks of providers developed by Plan to render health care services to Members, as defined in this Agreement. This Agreement shall apply to the South Florida Region whose service area may change from time-to-time. On the Effective Date, this Agreement supersedes and replaces in the South Florida Region any existing agreements between the parties related to the provision of health care services to Members. This Agreement also supersedes and replaces any existing agreements between Medical Group and the following entities to the extent such agreements relate to the provision of health care services to Members and to the extent such entities sponsor, issue, or administer a Benefit Contract, as defined in this Agreement: -CAC- United HealthCare Plans of Florida, Inc., -CAC- Ramsay Health Plans, Inc., United HealthCare Plans of Florida, Inc. The MetraHealth Insurance Company, The Travelers Insurance Company, Metropolitan Life Insurance Company, and United Health and Life Insurance Company.

## SECTION 1
## DEFINITIONS

*Benefit Contract*: Benefit plan that includes health care coverage, is sponsored, issued, or administered by Payor, and contains the terms and conditions of a Member's coverage.

*Customary Charge*: Fee for health care services charged by Medical Group that does not exceed the fee Medical

Group would charge any other person regardless of whether the person is a Member.

*Health Services*: Health care services and supplies covered by the Member's Benefit Contract.

*Medical Group Physician*: Doctor of medicine or osteopathy, duly licensed and qualified under the laws of the State of Florida, who practices as a shareholder, partner, or employee of Medical Group, and who has executed a Medical Group Physician Participation Addendum, the form of which is attached to this Agreement.

*Member*: Individual who is properly covered under a Benefit Contract.

*Member Expenses*: Amounts that are the Member's responsibility to pay Medical Group in accordance with the Member's Benefit Contract, including copayments, coinsurance, and deductibles.

*Participating Provider*: Health care professional or facility, including Medical Group, that has a written participation agreement in effect with Plan, directly or through another entity, to provide Health Services to selected groups of Members.

*Payor*: Entity or person authorized by Plan to access one or more networks of Participating Providers developed by Plan and that has the financial responsibility for payment of Health Services covered by a Benefit Contract.

*Primary Care Physician*: Doctor of medicine or osteopathy, or another health care professional as required by applicable statutes and regulations, who is duly licensed and qualified under the laws of the State of Florida, has met Plan criteria to be classified as a Primary Care Physician, and is a Participating Provider of primary care Health Services.



*Referral Authorization*: Approval by a Member's Primary Care Physician in a format determined by Payor, which may be an electronic format, for a health care professional or facility to render certain Health Services to the Member.

*Referral Physician*: Doctor of medicine or osteopathy who is a Participating Provider, who is not a Primary Care Physician, and to whom a Member is referred by a Primary Care Physician for the provision of certain Health Services.

## SECTION 2
## NETWORKS OF PARTICIPATING PROVIDERS

Medical Group shall provide Health Services to Members covered under the Benefit Contract types described in Exhibit 1, which may be modified from time to time by Plan upon written notice to Medical Group, and which includes, but is not limited to, Benefit Contracts that offer a network of Participating Providers.

When Benefit Contracts offer a network of Participating Providers the product name will appear on the Member's identification card and the Members will receive a provider directory listing all Participating Providers. Members covered under these Benefit Contract types are incented to receive services from Participating Providers. Such incentives may include, but are not limited to, a higher level of coverage and/or the potential reduction or elimination of Member Expenses.

## SECTION 3
## DUTIES OF MEDICAL GROUP

3.1 *Member Status*. To determine whether an individual is a Member and, therefore, entitled to receive Health Services, Medical Group shall ask the individual to present his/her identification card, which shall be provided to all Members by Payors, unless because of the type of Benefit Contract under which the Member has coverage no

identification card applies. In addition, Medical Group may contact Plan to obtain Plan's most current information on the individual as a Member. However, Medical Group acknowledges that such information is subject to change retroactively if Plan does not receive proper and timely notification regarding termination of a Member's coverage, as a result of the Member's final decision regarding continuation of coverage pursuant to state and federal laws, or if eligibility information Plan receives on the individual is later proven to be false. If Medical Group provides health care services to an individual and it is later determined the individual was not a Member at the time the health care services were provided, those services shall not be eligible for payment under this Agreement. Medical Group may then directly bill the responsible party for such services.

3.2 *Provision of Health Services.* Medical Group shall provide Health Services to all Members as Medical Group's patient load and appointment calendar permit and shall accept Members as new patients on the same basis as Medical Group is accepting non-Members as new patients without regard to race, religion, gender, color, national origin, age, physical or mental health status, or on any other basis deemed unlawful under federal, state, or local law. At all times, Medical Group shall require employed or subcontracted health care professionals and facilities, including, but not limited to, Medical Group Physicians, to comply with the protocols and requirements of Plan and Payor and the requirements of all applicable regulatory authorities. Such requirements include, but are not limited to, not billing Members for any amounts except Member Expenses and charges for services not covered under the Member's Benefit Contract. Medical Group warrants and represents that it has the authority to enter into this Agreement on behalf of all Medical Group Physicians and shall assure that Medical Group Physicians comply with all applicable terms of this Agreement.



3.3 *Utilization Management, Quality Improvement, and Other Plan or Payor Programs.* Medical Group shall cooperate with all credentialing and recredentialing processes and all utilization management, quality improvement, peer review, Member grievance, onsite review, or other similar Plan or Payor programs.

3.4 *Protocols.* Medical Group shall comply with protocols of Plan or Payor, including, but not limited to the following:

1. Refer Members only to other Participating Providers, unless otherwise authorized by Plan or Payor.
2. Be bound by any provider manual and credentialing plan, as modified from time-to-time by Plan or Payor.
3. Obtain prior authorization for certain Health Services as defined by Plan or Payor.
4. Follow approved billing procedures of Plan or Payor, as appropriate.
5. If Medical Group is composed of one or more Primary Care Physicians, Medical Group shall provide or arrange for the provision of advice and assistance to Members in emergency situations 24 hours per day, seven days per week.
6. If the Member's Benefit Contract requires the Member to receive certain Health Services from or upon referral by a Primary Care Physician, all Referral Physicians must adhere to the following additional protocols when those Heath Services are provided:

a. Referrals to other Participating or non-Participating Providers must first be authorized by the Member's Primary Care Physician.

b. Health Services must be provided pursuant to the terms and limitations of the Referral Authorization issued by or on behalf of the Member's Primary Care Physician.

7. Medical Group shall comply with the following requirements when admitting Members to a hospital:

a. Admit Members on the day of surgery, unless the Member's medical condition requires otherwise and Medical Group Physician has obtained prior authorization from Plan or Payor, as appropriate.

b. Notify Plan or Payor, as appropriate, by telephone at least 48 hours prior to a scheduled admission of a Member.

c. Notify Plan or Payor, as appropriate, immediately if Medical Group Physician admits a Member to a hospital for an emergency or for observation.

d. If the Medical Group Physician providing the Heath Services is a Referral Physician, the Medical Group Physician must also notify the Member's Primary Care Physician of all admissions in accordance with the above time frames.

Failure to comply with the above may result in denial of payment to Medical Group and/or termination of this Agreement. If any payment to Medical Group is denied due to Medical Group's failure to comply with the above



protocols, Medical Group shall not bill the Member for the denied amounts.

3.5 *Medical Group Physicians*. Acceptance of Medical Group as a Participating Provider is subject to the requirement that all physicians that join Medical Group become Participating Providers. However, Medical Group understands that all current and future physicians that join Medical Group must go through the Plan credentialing process before they are accepted as Participating Providers. Medical Group also understands that Medical Group Physicians may be individually terminated as Participating Providers pursuant to Section 9.4 of this Agreement. Medical Group shall notify Plan of all Medical Group Physicians who are added to the staff of Medical Group as well as those who are no longer on the staff of Medical Group.

3.6 *Hospital Privileges*. Medical Group and Medical Group Physicians agree to maintain privileges at Plan's participating hospitals and to notify Plan of any suspension, revocation, condition, limitation, qualification, or other material restriction of Medical Group Physician's staff privileges at any licensed hospital.

3.7 *Medical Group Locations*. Medical Group shall provide Health Services at the office locations set forth in Exhibit 2, as amended by Plan from time-to-time. Plan shall provide written notification to Medical Group of any changes to Plan's current service area. Medical Group shall provide Plan with 60-days prior written notification of any changes in its office locations.

## SECTION 4
## PAYMENT PROVISIONS

4.1 *Payment*. For the provision of Health Services to a Member, Payor shall pay Medical Group the applicable amounts set forth in the attached appendices. The obligation

for payment under this Agreement for Health Services rendered to a Member is solely that of Payor. Unless otherwise specified in the appendices or required by applicable statutes and regulations, Payor shall make payment to Medical Group within 30 days following Plan's receipt of all information necessary to process the claim.

Medical Group shall accept as payment in full for Health Services rendered to Members such amounts as are paid by Payor pursuant to this Agreement and shall not bill Members for non-covered charges which result from Payor's reimbursement methodologies. In no event shall Medical Group bill a Member for the difference between Customary Charges and the amount Medical Group has agreed to accept as full reimbursement under this Agreement. Medical Group may collect Member Expenses from the Member. If Payor denies payment for services rendered by Medical Group on grounds that the services are not medically necessary or charges for services not covered under the Member's Benefit Contract, as defined in the Member's Benefit Contract, Medical Group shall not collect payment from the Member for the services unless Medical Group first obtains the Member's written consent.

4.2 *Submission of Claims*. Medical Group shall submit claims for Health Services to Plan in a manner and format prescribed by Plan, which may be an electronic format. All information necessary to process the claims must be received by Plan no more than 90 days from the date the Health Services are rendered. Medical Group agrees that claims received after this time period may be rejected for payment, at Plan's and/or Payor's discretion. An exception to the 90 day claims submission deadline will be made if, as soon as possible but within the 90 days, Medical Group gives Plan written notice that the deadline can not be met due to coordination of benefits with another payor.



Unless otherwise directed by Plan, Medical Group shall submit claims using current HCFA 1500 or UB92 forms, whichever is appropriate, with applicable coding including, but not limited to, ICD9, CPT, Revenue, and HCPCS coding. Medical Group shall include in a claim the Member number, Customary Charges for the Health Services rendered to a Member during a single instance of service, Medical Group's federal tax identification number, and/or other identifiers requested by Plan. Medical Group shall not bill the Member for Health Services if Medical Group fills to submit claims in accordance with the above provisions.

Payor shall have the right to make, and Medical Group shall have the right to request, corrective adjustments to a previous payment; provided, however, that Payor shall have no obligation to pay additional amounts after 12 months from the date the initial claim was paid.

4.3 *Coordination of Benefits*. Medical Group shall be paid in accordance with Payor's coordination of benefits rules.

4.4 *Financial Responsibility*. Plan shall notify Medical Group in writing if Plan determines that a Payor has failed to maintain its responsibility to pay for services rendered. Any services which have been rendered by Medical Group prior to and after such notification, and which were not paid for by Payor, shall be considered ineligible for reimbursement under this Agreement and Medical Group may bill the Member directly for such services.

4.5 *Continuation of Benefits and Member Protection Provision*. This provision applies in instances where required by applicable statutes and regulations:

Medical Group agrees that in the event of Payor's insolvency or other cessation of operations, benefits to Members will continue and Medical Group will continue to provide Health Services to Members through the period for

which premium has been paid and benefits to Members confined in an inpatient facility on the date of Payor's insolvency or other cessation of operations will continue and Medical Group will continue to provide Health Services to Members until their discharge.

This provision supersedes and replaces the financial responsibility section when Plan is the Payor, when required by a specific Payor other than Plan, or when required pursuant to applicable statutes and regulations:

In no event, including, but not limited to, non-payment by Payor for Health Services rendered to Members by Medical Group, insolvency of Payor, or breach by Plan of any term or condition of this Agreement, shall Medical Group bill, charge, collect a deposit from, seek compensation, remuneration or reimbursement from, or have any recourse against any Member or persons acting on behalf of the Member for Health Services eligible for reimbursement under this Agreement; provided, however, that Medical Group may collect from the Member any Member Expenses or charges for services not covered under the Member's Benefit Contract.

The provisions of this section shall (1) apply to all Health Services rendered while this Agreement is in force; (2) with respect to Health Services rendered while this Agreement is in force, survive the termination of this Agreement regardless of the cause of termination; (3) be construed to be for the benefit of the Members, and (4) supersede any oral or written agreement, existing or subsequently entered into, between Medical Group and a Member or person acting on a Member's behalf, that requires the Member to pay for such Health Services.



## SECTION 5
## LIABILITY OF PARTIES, LAWS, REGULATIONS, AND LICENSES

5.1 *Liability Insurance.* Medical Group shall procure and maintain, at Medical Group's sole expense, medical malpractice insurance in the amounts of $1,000,000 per occurrence and $3,000,000 aggregate, and comprehensive general and/or umbrella liability insurance in the amount of $1,000,000 per occurrence and aggregate. Medical Group shall also require that all health care professionals employed by or under contract with Medical Group to render Health Services to Members procure and maintain malpractice insurance, unless they are covered under Medical Group's insurance policies. Medical Group's and other health care professionals' medical malpractice insurance shall be either occurrence or claims made with an extended period reporting option under such terms and conditions as may be reasonably required by Plan. Prior to the Effective Date of this Agreement and at each policy renewal thereafter, Medical Group shall submit to Plan written evidence of insurance coverage.

5.2 *Laws, Regulations*, and Licenses. Medical Group shall maintain all federal, state, and local licenses, certifications, and permits, without material restriction, which are required to provide health care services according to the laws of the jurisdiction in which Health Services are provided and shall comply with all applicable statutes and regulations. Medical Group shall also require that all health care professionals employed by or under contract with Medical Group to render Health Services to Members, including covering physicians, comply with this provision.

## SECTION 6
## NOTICES

Medical Group shall notify Plan within ten days of knowledge of the following:

1. Changes in liability insurance carriers, termination of, renewal of, or any other material changes in liability insurance, including reduction of limits, erosion of aggregate, changes in retention, or non-payment of premium.

2 Action which may result in the suspension, revocation, condition, limitation, qualification, or other restriction on a Medical Group Physician's licenses, certifications, or permits by any government under which a Medical Group Physician is authorized to provide health care services.

3. Any suspension, revocation, condition, limitation, qualification, or other restriction of a Medical Group Physician's staff privileges at any licensed hospital, nursing home, or other facility at which a Medical Group Physician has staff privileges during the term of this Agreement.

4. Change in name, ownership, or federal tax identification number.

5. Indictment, arrest, or conviction for a felony or for any criminal charge related to the practice of Medical Group's profession.

6. Conduct which creates an imminent danger to a Member.

Unless otherwise specified in this Agreement, any notice or other communication required or permitted shall be in writing. All written notices or communication shall be deemed to have been given when delivered in person or, if delivered by first-class United States mail, on the date mailed, proper postage prepaid, and properly addressed to the appropriate party at the address set forth at the signature portion of this Agreement or to another more recent address of which the sending party has received written notice. The



parties shall provide each other with proper addresses of all designees that should receive certain notices or communication instead of that party.

## SECTION 7
## RECORDS

7.1 *Confidentiality of Records*. Plan and Medical Group shall maintain the confidentiality of all Member records in accordance with any applicable statutes and regulations.

7.2 *Maintenance of and Plan Access to Records*. Medical Group shall maintain adequate medical, financial, and administrative records related to Health Services rendered by Medical Group under this Agreement. In order to perform its utilization management and quality improvement activities, Plan shall have access to such information and records, including claims records, within 14 days from the date the request is made, except that, in the case of audit by Plan such access shall be given at the time of the audit. If requested by Plan, Medical Group shall provide copies of such records free of charge. Unless a longer time period is required by applicable statutes or regulations, Plan shall have access to and the right to audit information and records during the term of this Agreement and for five years following its termination or longer if records are under review or audit, until such review or audit is completed. It is Medical Group's responsibility to obtain any Member consent required in order to provide Plan with requested information and records or copies of records.

7.3 *Government and Accrediting Agency Access to Records*. The federal, state, and local government, or accrediting agencies including, but not limited to, the National Committee for Quality Assurance, and any of their authorized representatives shall have access to, and Plan and Medical Group are authorized to release, in accordance with applicable statutes and regulations, all information and

records or copies of such, within the possession of Plan or Medical Group, which are pertinent to and involve transactions related to this Agreement if such access is necessary to comply with accreditation standards, statutes, or regulations applicable to Plan, Payor, or Medical Group.

## SECTION 8
## RESOLUTION OF DISPUTES

The parties shall work together in good faith to resolve any disputes about their business relationship. If the parties are unable to resolve the dispute within 30 days following the date one party sent written notice of the dispute to the other party, and if either party wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association, in no event may arbitration be initiated more than one year following the sending of written notice of the dispute. Any arbitration proceeding under this Agreement shall be conducted in Dade County, Florida. The arbitrators may construe or interpret but shall not vary or ignore the terms of this Agreement, shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages, and shall be bound by controlling law. If the dispute pertains to a matter which is generally administered by certain Plan procedures, such as a credentialing or quality improvement plan, the procedures set forth in that plan must be fully exhausted by Medical Group before Medical Group may invoke its right to arbitration under this section. The parties acknowledge that because this Agreement affects interstate commerce the Federal Arbitration Act applies.

## SECTION 9
## TERM AND TERMINATION

9.1 *Term*. This Agreement shall begin on the Effective Date, shall remain in effect for one year, and shall



automatically renew for successive one-year terms until terminated as provided below.

9.2 *Termination*. This Agreement may be terminated as follows:

1. by mutual agreement of Plan and Medical Group.
2. by either party upon 90 days prior written notice to the other party.
3. by either party, in the event of a breach of this Agreement by the other party, upon 30 days prior written notice to the other party.
4. by Plan, immediately upon written notice to Medical Group, due to Medical Group's loss or suspension of licensure, imposition of sanctions, or certification or loss of insurance.
5. by Medical Group upon 60 days prior written notice to Plan due to an amendment made to this Agreement pursuant to Section 10.1.

9.3 *Termination of Medical Group Physician*. Plan may require Medical Group to terminate the status of any individual Medical Group Physician as a Participating Provider as follows:

1. In the event of a material breach of this Agreement by Medical Group Physician, upon 30 days prior written notice to Medical Group and Medical Group Physician.
2. Immediately upon written notice to Medical Group and Medical Group Physician due to the Medical Group Physician's loss or suspension of licensure or certification, imposition of sanctions, or loss of liability insurance required under this Agreement.
3. In accordance with the Plan credentialing process.

4. Due to a conviction for any criminal charge related to the practice of Medical Group Physician's profession.

5. Due to conduct which creates an imminent danger to a Member.

9.4 *Regulatory Termination*. In addition to the above, the following shall apply with respect to arrangement between Plan and Medical Group or any individual Medical Group Physician:

1. This Agreement may be terminated immediately upon issuance of an order by the Florida Department of Insurance ("DOI").

2. Nonpayment by Payor shall not be a valid reason for avoiding any required notice period for termination of the Agreement.

3. In addition to any prior notice Medical Group, Medical Group Physician and Plan are required to provide pursuant to this section, Medical Group, Medical Group Physician and Plan shall also give the same written notice of such termination to the DOI, when required by law.

Medical Group shall receive notice of termination by Plan of any Medical Group Physician. Termination of any individual Medical Group Physician shall not constitute termination of the entire Agreement.

In the event of the termination of Medical Group Physician, that Medical Group Physician shall not provide Health Services to Members after the effective date of termination, unless otherwise agreed to by Plan in writing.

9.5 *Information to Members*. Medical Group acknowledges the right of Plan to inform Members of Medical Group's termination and agrees to cooperate with Plan in deciding on the form of such notification. In addition



to any prior notice Medical Group and Plan are required to provide pursuant to this section, Medical Group and Plan shall also give at least 60 days prior written notice of such termination to the DOI, when required by law.

9.6 *Obligations Upon Termination*. Upon the termination of this Agreement or termination of any Medical Group Physician, the rights and obligations of the parties shall cease, except as otherwise provided by this Agreement. When medically necessary, Medical Group Physician will continue to provide Health Services to Members for 60 days if the Member has a life-threatening condition or a disabling and degenerative condition or until completion of postpartum care if the Member is in the third trimester of pregnancy. For such continued care, Plan, Medical Group, and Medical Group Physician shall be bound by the terms of this Agreement.

## SECTION 10
## MISCELLANEOUS

10.1 *Amendment*. Plan may amend this Agreement by sending a copy of the amendment to Medical Group at least 30 days prior to its effective date. The signature of Medical Group shall not be required. Renegotiation of the rates in this Agreement shall be upon the mutual consent of the parties. Plan may also amend this Agreement to comply with the requirements of state and federal regulatory authorities and shall give written notice to Medical Group of such amendment and its effective date. Unless such regulatory authorities direct otherwise, the signature of Medical Group shall not be required.

10.2 *Assignment*. Plan may assign all or any of its rights and responsibilities under this Agreement to any entity controlling, controlled by, or under common control with Plan. Medical Group may assign any of its rights and responsibilities under this Agreement to any person or entity

only upon the prior written consent of Plan, which consent shall not be unreasonably withheld.

10.3 *Administrative Responsibilities*. Plan may delegate certain administrative responsibilities under this Agreement to another entity, including, but not limited to, Payor or is designee. In addition, certain Payor responsibilities may actually be performed by its designee.

10.4 *Relationship Between Plan and Medical Group*. The relationship between Plan and Medical Group is solely that of independent contractors and nothing in this Agreement or otherwise shall be construed or deemed to create any other relationship, including one of employment, agency, or joint venture.

10.5 *Name, Symbol and Service Mark*. During the term of this Agreement, Medical Group. Plan, and Payor shall have the right to use each other's name solely to make public reference to Medical Group as a Participating Provider. Medical Group, Plan, and Payor shall not otherwise use each other's name, symbol, or service mark without prior written approval.

10.6 *Confidentiality*. Neither party shall disclose to third parties any confidential or proprietary business information which it receives from the other party including but not limited to financial statements, business plans, protocols. and programs; except that Medical Group may disclose information to a Member relating to the Member's treatment plan and the payment methodology, but not specific rates and Plan may disclose certain terms to Payors or designees that need the information to process claims or administer a Benefit Contract any may file the form of this Agreement with any federal or state regulatory entity as may be required by applicable law.

10.7 *Communication*. Plan encourages Medical Group to discuss with Members treatment options and their



associated risks and benefits, regardless of whether the treatment is covered under the Members Benefit Contract. Nothing in this Agreement is intended to interfere with Medical Group's relationship with Members as patients of Medical Group or with Plan's ability to administer its quality improvement, utilization management and credentialing programs.

10.8 *Appendices*. Additional and/or alternative provisions, if any, related to certain Health Services rendered by Medical Group to Members covered by certain Benefit Contracts are set forth in the appendices.

10.9 *Entire Agreement*. This Agreement constitutes the entire agreement between the parties in regard to its subject matter.

10.10 *Governing Law*. This Agreement shall be governed by and construed in accordance with Florida law and ERISA.

10.11 *Medicare Members*. If a Medicare Appendix is attached to this Agreement, Medical Group agrees to provide Health Services to Members and to cooperate with Plan in providing any information and/or notices to Members who are enrolled in a Medicare HMO benefit program unless specified in the Benefit Contract. Medical Group also understands that Plan's agreements with Participating Providers are subject to review and approval by the Health Care Financing Administration ("HCFA").

10.12 *Medicaid Members*. If a Medicaid Appendix is attached to this Agreement Medical Group agrees to provide Health Services to Members enrolled in Plan's Medicaid benefit program and to comply with any additional requirements set forth in the Medicaid Appendix attached to this Agreement. Medical Group also understands that Plan's agreements with Participating Providers are subject to review and inspection by the appropriate state and federal regulatory agencies.

10.13 *Limited Procedures*. Plan shall notify Medical Group in writing of any limitation, restriction and/or condition placed upon Medical Group with respect to the provision of specific Health Services to Members. Any additional and/or alternative provisions related to Health Services rendered by Medical Group to Members covered by certain Benefit Contracts are set forth in the appendices.

THIS AGREEMENT CONTAINS A BINDING ARBITRATION PROVISION THAT MAY BE ENFORCED BY THE PARTIES.

| | |
|---|---|
| United HealthCare of Florida, Inc.<br>13621 Northwest 12th Street<br>Sunrise, FL 33323 | Community Orthopedics & Pain Management, Inc.<br>7421 N. University Drive<br>Suite [handwritten: 107]<br>Tamarac, Florida 33321<br>Tax ID 65-0796980 |
| By: [handwritten signature: illegible name ] | By: [handwritten signature: Porth MD] |
| Its: [handwritten: Dir. of Contracting] | Its: [handwritten: President] |
| Date: [handwritten: 6/29/98] | Date: [handwritten: 6/12/98] |



## MEDICAL GROUP PHYSICIAN PARTICIPATION ADDENDUM

THIS ADDENDUM, effective [handwritten: 8/1/98] is made between Plan, Community Orthopaedics & Pain Management, Inc. (Medical Group), and Manuel Porth, M.D. ("Medical Group Physician") for the purpose of setting forth the terms and conditions under which Medical Group Physician shall render Health Services to Members.

1. *Credentialing*. Medical Group shall supply all information requested by Plan for the purpose of credentialing Medical Group Physician. Medical Group Physician must be approved for participation by Plan in writing before rendering Health Services to Members.

2. *Rights and Obligations*. Medical Group Physician shall have the rights and obligations provided in the Agreement which are applicable to Medical Group. Medical Group Physician understands that certain provisions of the Agreement shall also be individually binding on Medical Group Physician and that Plan may require performance of all provisions by Medical Group Physician. Medical Group Physician also understands that Plan and Medical Group may amend the Agreement, without right of review by or approval of Medical Group Physician.

3. *Reimbursement*. Medical Group Physician agrees to look solely to Medical Group for reimbursement for Health Services provided to Members.

United HealthCare of
Florida, Inc.
13621 Northwest 12th Street
Sunrise, FL 33323

By: [handwritten signature:
*illegible name*]

Its: [handwritten:
*Dir. of Contracting*]

Date: [handwritten: *6/29/98*]

Community Orthopaedics &
Pain Management, Inc.
7421 N. University Drive
Suite [handwritten: 107] ~~304~~
Tamarac, Florida 33321

By: [handwritten signature:
*Porth MD*

Its: _____

Date: [handwritten: *6/12/98*]
Manuel Porth, M.D.
SS#: [handwritten:
*366-40 2694*]
License: [handwritten:
*0028637*]
By: : [handwritten signature:
*Porth MD*

Date: [handwritten: *6/12/98*]



## EXHIBIT I
### NETWORKS OF PARTICIPATING PROVIDERS

Medical Group shall participate in the networks of Participating Providers established by Plan for the Benefit Contract types identified below:

- Benefit Contracts where Members are offered a network of Participating Providers and must select a Primary Care Physician. The Primary Care Physician coordinates the Member's care and approves the rendering of Health Services to Members by other Participating Providers. An option for this Benefit Contract allows the Member to receive Health Services from a Participating or non-Participating Provider, without the approval of the Primary Care Physician.
- Benefit Contracts where Members are offered a network of Participating Providers but are not required to select a Primary Care Physician. The Member may receive Health Services from a Participating Provider of his or her choice. An option for this Benefit Contract allows the Member to receive Health Services from non-Participating Providers.
- Benefit Contracts where Members are not offered a network of Participating Providers from which they may receive Health Services.
- Benefit Contracts for Medicaid Members.
- Benefit Contracts for Medicare Members.

EXHIBIT 2
MEDICAL OFFICE LOCATIONS

7421 North University Drive
Suite -304[handwritten: *107*]
Tamarac, Florida 33321
Phone: (954) 724-3400
Fax: (954) 724-9451



ELDERCARE APPENDIX

APPLICABILITY

The provisions of this Appendix apply to Health Services rendered by Medical Group to Members covered by Benefit Contracts sponsored or issued by Plan for its ElderCare program.

SECTION 1
PAYMENT

1.1 For the provision of Health Services rendered to Members covered under Plan's ElderCare program, Medical Group shall be paid by Payor and/or Medicare as follows:

| Type of Coverage: | Medicare Responsibility: | Payor Responsibility: |
|---|---|---|
| ElderCare + Medicare Parts A and B | Bill Medicare | The Medicare deductible upon submission of an explanation of Medicare benefits and an invoice. Coinsurance will not be reimbursed. |
| ElderCare + Medicare Part B | Bill Medicare for Part B | The Medicare deductible upon submission of an explanation or Medicare benefits and an invoice. Coinsurance will not be reimbursed. |
| ElderCare + No Medicare | Not Applicable | Medicaid rate of payment set forth in the Agency Medicaid reimbursement schedule. |

1.2 The additional requirements set forth in the Medicaid Appendix shall be applicable to Health Services rendered to the Members described herein; however, payment shall be provided for in this Appendix.



## MEDICARE APPENDIX
## FEE MAXIMUM

## APPLICABILITY

The provisions of this appendix apply to Health Services rendered by Medical Group to Plan Medicare Members and Affiliated Medicare Members pursuant to a contract with HCFA.

## SECTION 1
## ADDITIONAL DEFINITIONS

*Affiliated Health Plan*: Health plan affiliated with Plan, either by common ownership or control or through a written agreement.

*Affiliated Medicare Member*: Member covered by a Benefit Contract sponsored, issued, or administered by an Affiliated Health Plan.

*Fee Maximum*: Maximum fee for Health Services rendered by Participating Providers to Plan Medicare Members, as determined from time-to-time by Plan. A sample of the most recent Fee Maximum schedule is available to Medical Group upon request.

*Plan Medicare Member*: Member covered by a Benefit Contract sponsored, issued, or administered by Plan.

## SECTION 2
## PAYMENT PROVISIONS

2.1 *Payment for Health Services Rendered to Plan Medicare Members*. Payor shall pay Medical Group for Health Services rendered to Plan Medicare Members the lesser of Medical Group's Customary Charge or the Fee Maximum for such Health Services.

2.2 *Payment for Health Services Rendered to Affiliated Medicare Members*. For the provision of Health Services to Affiliated Medicare Members, Medical Group shall be paid

by the Affiliated Health Plan the applicable Medicare allowable rates for such Health Services, less any applicable Member Expenses, which shall be collected by Medical Group directly from the Affiliated Medicare Members.



# MEDICAID APPENDIX

## APPLICABILITY

The provisions of this appendix apply to Health Services rendered by Medical Group to Members enrolled in Plan's Medicaid HMO benefit program. Such Members, the counties served and the benefit program are defined in Plan's contract with the Agency for Health Care Administration ("AHCA")

## SECTION 1
## ADDITIONAL REQUIREMENTS

1.1 *Provision of Health Services*. Medical Group agrees to provide Health Services to Members and to comply with all applicable conditions stated in this appendix. Medical Group shall provide for timely access to appointments in accordance with the following availability schedule: urgent care - within one day; routine sick care - within one week; well care—within one month.

1.2 *Payment for Health Services*. For the provision of Health Services rendered to Members Medical Group shall be paid pursuant to this appendix.

Medical Group shall look solely to Plan for payment of Health Services provided to Members pursuant to this appendix and will hold AHCA, the Department of Health and Human Services ("DHHS") and Members harmless in the event that Plan cannot or will not pay for such Health Services.

1.3 *Workers' Compensation Insurance*. During the term of the Agreement, Medical Group agrees to maintain workers' compensation insurance for all of its employees connected with the services under this contract. Such insurance shall comply with Florida's Workers' Compensation Law.

1.4 *Liability for Damages.* Medical Group shall indemnify and hold AHCA and Members harmless from and against all claims, damages, causes of action, costs or expense, including court costs and reasonable attorney fees to the extent proximately caused by any negligent act or other wrongful conduct arising from the Agreement. This clause survives the termination of the Agreement, including breach due to insolvency.

1.5 *Inspection of Facilities.* Medical Group shall permit AHCA's designated representatives to access Medical Group's facilities, upon reasonable advance notice, to evaluate through inspection or other means the quality, appropriateness and timeliness of services performed.

1.6 *Maintenance of Records.* Medical Group shall maintain an adequate record keeping system for recording services, charges, dates and all other commonly accepted information elements for services rendered to Members.

1.7 *Reporting on Number of Active Patient.* Medical Group shall inform Plan when the number of active patients from all populations serviced by Medical Group reaches 2,500 active patients. This ratio may be increased by 500 patients for each full-time employee advance registered nurse practitioner or full-time employee physician assistant affiliated with Medical Group as a provider in the practice, with a maximum capacity of 3,000 active patients. Active patients are those who have been seen at least three times per year. Payor will riot assign any new Medicaid Members to Medical Group until his/her patient load drops below 2,500 or 3,000 when Medical Group employs an advanced nurse practitioner or physician assistant.



## SECTION 2
### PAYMENT FOR HEALTH SERVICES

2.1 *Payment for Health Services.* Payor shall pay Medical Group for Health Services rendered to Members the lesser of Medical Group's Customary Charge or the Fee Maximum for such Health Services.

# ALL PAYOR APPENDIX
## FEE MAXIMUM

## APPLICABILITY

Unless another appendix to this Agreement applies specifically to certain Members, the provisions of this appendix apply to Health Services rendered by Medical Group to Members covered by Benefit Contracts sponsored, issued, or administered by all Payors.

### SECTION 1
### ADDITIONAL DEFINITIONS

*Fee Maximum*: Maximum fee for Health Services rendered by Participating Providers, as determined from time-to-time by Plan. The Fee Maximum for the same Health Service rendered pursuant to different Benefit Contracts may vary. A sample of the most recent Fee Maximum is available to Medical Group upon request.

### SECTION 2
### PAYMENT PROVISIONS

2.1 *Payment for Health Services.* Payor shall pay Medical Group for Health Services rendered to a Member the lesser of Medical Group's Customary Charge, less any applicable Member Expenses, or the Fee Maximum for such Health Services, less any applicable Member Expenses.



# PLAN MEDICARE+CHOICE ADDENDUM

The provisions of this Addendum apply to health care services rendered by Provider (for purposes of this Addendum, the "Provider"), on or after January 1, 1999, to individuals covered under a UnitedHealthcare of Florida. Inc. ("Plan") benefit plan pursuant to its Medicare+Choice contract ("Plan M+C Contract") with the Health Care Financing Administration ("HCFA"). With respect to the rendering of health care services to such individuals, the provisions of this Addendum shall prevail over any provision in the Agreement which may conflict or appear inconsistent with any provision in this Addendum.

### DEFINITIONS

The following terms are defined for the purpose of this Addendum only:

*Benefit Contract*: A benefit plan of health care coverage for Medicare beneficiaries that is sponsored, issued or administered by Plan and contains the terms and conditions of a Plan M+C Member's coverage.

*Health Services*: The health care services and supplies which a Plan M+C Member is entitled to receive pursuant to his or her Benefit Contract.

*Member Expenses*: Any amounts that are the Plan M+C Member's responsibility to pay Provider in accordance with his or her Benefit Contract, including copayments, coinsurance and deductibles.

*Participating Provider*: A health care professional or facility, including Provider, that has a written participation agreement in effect with Plan, directly or through another entity, to provide Health Services to Plan M+C Members.

*Plan Medicare+Choice ("Plan M+C") Member*: An individual who is properly enrolled for coverage under a Benefit Contract.

PROVISIONS

1. *Provision of Health Services.* Provider agrees to provide or arrange for the provision of Health Services to Plan M+C Members in accordance with the terms set forth in the Agreement and this Addendum, and in a manner consistent with professionally recognized standards of health care. Provider shall provide Health Services to all Plan M+C Members on the same basis as Provider is accepting non-Plan M+C Members as new patients without regard to race, ethnicity, religion, gender, color, national origin, age, sexual orientation, genetic information, source of payment, any factor related to physical or mental health status, or on any other basis deemed unlawful under federal, state or local law.

2. *Access to Care.* Provider shall cooperate with Plan's written standards for timely access to care and services by Plan M+C Members. Where Benefit Contracts require certain services to be provided only upon the referral of a primary care physician, the following Health Services may be provided to Plan M+C Members without such a referral: (1) screening mammography and influenza vaccination Health Service; and (2) for women, routine and preventive Health Services from a Participating Provider that is a women's health specialist. No Member Expenses shall apply to influenza and pneumococcal vaccines.

3. *Cooperation With Processes, Policies and Programs.* Provider shall cooperate with the following: (1) all credentialing and recredentialing processes and all medical management, quality assessment and



performance improvement, medical policy, peer review, on site review, advance directives, or other similar HCFA or Plan policies and programs; (2) Plan's member grievance and appeal/expedited appeal processes, including gathering and forwarding information to Plan on a basis that will permit Plan to meet HCFA required timeframes for disposition of grievances and appeals; (3) the activities of any independent quality review and improvement organization approved by HCFA that is under contract with Plan; (4) as applicable, Plan's processes for identifying Plan M+C Members with complex or serious medical conditions, assessment of those conditions, and establishment and implementation of a treatment plan appropriate to those conditions; and (5) Plan's processes for conducting an initial assessment of each Plan M+C Member's health care needs within 90 days of the effective date of their enrollment. From time to time, Plan shall consult with Participating Providers, as appropriate, regarding Plan's medical policy, quality assurance program and medical management procedures.

4. *Data Collection Requirements.* Provider acknowledges that Plan is required by HCFA to maintain a health information system that collects, analyzes and integrates all data necessary to compile, evaluate and report certain statistical data related to costs, utilization and quality, and such other matters as HCFA may require from time to time. Provider hereby agrees to submit to Plan, upon request, all data necessary for Plan to fulfill these obligations, and within the timeframes specified by Plan to meet HCFA requirements. Provider hereby represents and warrants, and to the extent required by Plan, hereby agrees to certify in waiting at the time of submission to Plan or its designee, that all data including, but not limited to,

encounter data and other information that HCFA may specify, shall be truthful, reliable, accurate and complete. Provider further agrees to hold harmless and indemnify Plan for any fines or penalties it may incur due to Provider's submission of inaccurate or incomplete data.

5. *Compliance with Protocols*. Provider shall cooperate and comply with the protocols of Plan, which include, but are not limited to:

   (a) All protocols referenced in the Agreement, as applicable.

   (b) Any provider manual and credentialing plan, as modified from time to time by Plan.

   (c) If Provider is a Plan M+C Member's primary care physician, Provider agrees to provide or arrange for the provision of advice and assistance to Plan M+C Members in emergency situations, and arrange for on-call coverage, 24 hours per day, 7 days per week.

6. *Consequences for Failure to Cooperate*. Failure to cooperate and comply with any of the provisions of the Agreement and this Addendum including, but not limited to, sections 2, 3, 4 and 5 above, may result in denial of payment to Provider and/or termination of Provider's participation in the Plan Medicare+Choice network of Participating Providers in accordance with the Agreement and this Addendum. If any payment to Provider is denied due to failure to co[illegible]ly with any of the provisions of the Agreement or this Addendum, Provider shall not bill the Plan M+C Member for the denied amount.



7. *Payment*. For the provision of Health Services to Plan M+C Members, Provider shaft be paid in accordance with the existing payment arrangement for Medicare Members, as set forth in the Agreement. If no time frame for payment is set forth in the existing arrangement, payment to Provider for Health Services rendered to Plan M+C Members shall be made promptly (but no later than 60 days) after receipt of all information necessary to process and pay the claim, unless a shorter time frame is required by applicable statutes and regulations. Member Expenses, if any, may be collected directly from the Plan M+C Member. Provider incentive arrangements, if any, are set forth in the Agreement. Any additional information related to Provider's payment arrangement (such as a particular fee schedule amount) is available by contacting Plan. If Provider is responsible for making payment to subcontracted providers for Health Services provided to Plan M+C Members, then Provider shall make such payments in accordance with this provision. Provider shall ensure that payment and incentive arrangements with subcontractors, if any, are specified in a written agreement. Additional information regarding payment and incentive payments to subcontracted providers must be made available to the subcontracted providers upon request.

8. *Member Protection and Continuation of Benefits*. Provider agrees that in no event, including, but not limited to, non-payment by Plan or an intermediary, insolvency of Plan or an intermediary, or breach by Plan of this Agreement, shall Provider bill, charge, collect a deposit from, seek compensation, remuneration or reimbursement from, or have any recourse against any Plan M+C Member or person (other than Plan or an intermediary) acting on behalf of the Plan M+C Member for Health Services provided

pursuant to this Agreement. This provision does not prohibit Provider from collecting Member Expenses or fees for services not covered under the Plan M+C Member's Benefit Contract and delivered on a fee-for-service basis to the Plan M+C Member. This provision does not prohibit Provider and a Plan M+C Member from agreeing to continue services solely at the expense of the Plan M+C Member, as long as Provider has clearly informed the Plan M+C Member that the Benefit Contract may not cover or continue to cover a specific service or services, and documentation of Provider's conversation with the Plan M+C Member is made available to Plan upon request.

In the event of Plan's or an intermediary's insolvency or other cessation of operations or termination of the Plan M+C Contract, Provider will continue to provide Health Services to Plan M+C Members through the period for which premium has been paid to Plan on behalf of the Plan M+C Member, or, in the case of Plan M+C Members who are hospitalized as of such period or date, until the Plan M+C Member's discharge from an inpatient facility, whichever time is greater. Covered benefits for Plan M+C Members confined in an inpatient facility on the date of insolvency or other cessation of operations will continue until their continued confinement in an inpatient facility is no longer medically necessary.

The provisions of this section shall be construed in favor of the Plan M+C Member, shall survive the termination of this Agreement regardless of the reason for termination, including the insolvency of Plan, and shall supersede any oral or written contrary agreement between Provider and a Plan M+C Member or the representative of a Plan M+C Member if the contrary agreement is inconsistent with this section.



For the purpose of this section, an "intermediary" is defined as a person or entity authorized to negotiate and execute this Agreement on behalf of Provider or on behalf of a network through which Provider elects to participate.

9. *Private Contracts*. Plan may not pay, directly or indirectly, on any basis, for services rendered by Provider to a Plan M+C Member if Provider files or is required to file an affidavit with a Medicare carrier agreeing to furnish Medicare covered services to any Medicare beneficiary through a private contract, except that payment may be made by Plan for emergency and urgent care services. Such payment shall be limited to the Medicare allowable charge.

10. *Excluded Individuals*. Provider is prohibited from employing or contracting with an individual who is excluded from participation in Medicare under section 1128 or 1128A of the Social Security Act (or with an entity that employs or contracts with such an individual) for the provision of any of the following: (1) health care; (2) utilization review; (3) medical social work; or (4) administrative services.

11. *Laws and Regulations*. Provider and Plan shall each maintain, without material restriction, all applicable federal, state and local licenses, certifications and permits which are required to fulfill their obligations under the Agreement and this Addendum in the applicable jurisdiction. Provider shall comply with all applicable Medicare laws, regulations and HCFA instructions, and all applicable federal, state and local laws, rules and regulations including, but not limited to, Title VI of the Civil Rights Act of 1964, The Age Discrimination Act of 1975, and The Americans With Disabilities Act. Provider shall also cooperate with Plan in its efforts to comply with the laws, regulations and other requirements of applicable regulatory

authorities. Provider shall require that all health care professionals employed by or under contract with Provider to render Health Services to Plan M+C Members, including covering physicians, comply with this provision.

12. *Records*.

(a) *Maintenance and Accuracy Records*. Provider will maintain adequate medical, financial and administrative records related to the services rendered by Provider under the Agreement and this Addendum in an accurate and timely manner.

(b) *Access to Records*.

(i) Plan, The Secretary of Health and Human Services (the "Secretary"), the Comptroller General or their designees shall have the right to audit, evaluate or inspect any books, contracts, medical records, patient care documentation and other records of Provider that pertain to: (1) the services performed under the Agreement and this Addendum; (2) reconciliation of benefit liabilities; (3) determination of amounts payable; or (4) other relevant matters as such person conducting the audit, evaluation or inspection deems necessary.

(ii) The right described above shall extend through 6 years from the final date of the applicable Plan M+C Contract period or completion of audit, whichever is later; provided, however, that such access may be required for a longer time period if: (1) HCFA determines that there is a special need to retain a particular record or group of records for a longer period and HCFA provides notice at least 30 days before the normal disposition date; (2) HCFA determines that there has been a termination, dispute, fraud or similar fault, in



which case the retention may be extended to 6 years from the date of any resulting final resolution of the matter; or (3) HCFA determines that there is a reasonable possibility of fraud, in which case it may perform the inspection, evaluation or audit at any time.

(iii) For the purpose of conducting the above activities, Provider shall make available its premises, physical facilities and equipment, records relating to Plan, M+C Members, and any additional relevant information that Plan or HCFA may require.

(c) *Member Access to Records*. Provider also agrees to establish procedures to ensure timely access by Plan M+C Members to medical records and other health and enrollment information that pertains to them.

(d) *Confidentiality of Records*. Plan and Provider shall safeguard the privacy of any health information that identifies a particular Plan M+C Member. Plan and Provider shall abide by all federal and state laws regarding confidentiality and disclosure of medical records and other health and enrollee information.

13. *Rules of Participation*. Plan's rules of participation are set forth in the Agreement and this Addendum, and in the provider manual and credentialing plan, which shall be made available to Provider from time to time. Written notice of material changes to the rules of participation shall be provided prior to the effective date of such changes.

14. *Additional Termination Provisions*. Notwithstanding any provision in the Agreement to the contrary, the following provisions shall apply to Provider's

participation in the Plan Medicare+Choice network of Participating Providers only:

(a) Provider's participation in the Plan Medicare+Choice network of Partici-pating Providers may be terminated by Plan immediately upon written notice to Provider due to: (1) loss or suspension of licensure or certification; (2) Provider sanction by Medicare; or (3) Provider entering into a private contract with any Medicare beneficiary; or

(b) Provider's participation in the Plan Medicare+Choice network of Partici-pating Providers may be terminated by Plan, upon 30 days prior written notice to Provider, due to failure to cooperate and comply with any of the provisions of the Agreement or this Addendum including, but not limited to, sections 2, 3, 4 and 5 of this Addendum.

(c) If the Agreement contains any provision permitting termination of the Agreement without cause, notice of such termination shall be given by either party in accordance with the applicable provision of the Agreement, but in no such case shall the notice period be less than 60 days prior to the termination date.

(d) If Provider is a physician, any written notice of Provider's suspension or termination shall include the following, to the extent applicable: (1) the reason for the suspension or termination; (2) the standards and profiling data used by Plan to evaluate Provider; (3) the numbers and mix of physicians needed in the network; (4) Provider's right to appeal the action; and (5) the process and timing for requesting a hearing.



15. *Acknowledgements and Delegated Activities. Provider acknowledges and agrees that*:

(a) Agreements with Participating Providers are subject to review and approval by HCFA.

(b) Plan receives payments in whole or in part from federal funds. Contractors and subcontractors, including Provider, are subject to certain laws that are applicable to individuals and entities receiving federal funds.

(c) Plan oversees and is accountable to HCFA for any functions or responsibilities that are contained in the Plan M+C Contract, including those that Plan may delegate to others. Activities or responsibilities under the Plan M+C Contract that are delegated by Plan to Provider must be set forth in a written agreement that contains, at a minimum, the following HCFA delegation requirements: (1) the specific delegated activities and reporting requirements; (2) a right of revocation of the delegation activities and reporting requirements in instances where HCFA or Plan determines that Provider has not performed satisfactorily; (3) a provision specifying that the performance of Provider is monitored by Plan on an ongoing basis; (4) a provision specifying that the credentialing process must be reviewed and approved by Plan, and Plan shall audit the credentialing process on an ongoing basis; and (5) a requirement that Provider must comply with all applicable Medicare laws, regulations and HCFA instructions. Any written delegation agreement between Plan and Provider is hereby amended to include these requirements.

16. *Regulatory Amendment*. Plan may amend this Addendum to comply with the requirements of state and federal regulatory authorities, and shall give written notice to Provider of such amendment and its effective date. Unless such regulatory authorities direct otherwise, the signature of Provider will not be required.

17. *Noninterference with Advice to Plan M+C Members*. Nothing in the Agreement arid this Addendum is intended to prohibit or restrict Provider from advising or advocating on behalf of a Plan M+C Member about (1) the Plan M+C Member's health status, medical care, or treatment options (including alternative treatments that may be self-administered), including providing sufficient information to the Plan M+C Member to provide an opportunity to decide among all relevart treatment options, (2) the risks, benefits and consequences of treatment or non-treatment, and (3) the opportunity for tine Plan M+C Member to refuse treatment and express preferences about future treatment decisions. Provider must provide information regarding treatment options in a culturally competent manner, including the option of no treatment. Provider must assure that individuals with disabilities are furnished with effective communications in making decisions regarding treatment options.

18. *Affiliated Health Plans*. To the extent the Agreement includes payment terms for the provision of health care services to individuals covered by Medicare plans affiliated with Plan, either by common ownership or control or



through a written agreement (each an "Affiliated Health Plan"), the requirements in this Addendum shall apply equally to services rendered to individuals enrolled in all Medicare+Choice Affiliated Health Plans.

19. *Individual Providers and Facilities*.

(a) If Provider is a medical group, facility or other entity whose staff of health care professionals consists wholly or partially of employees, Provider represents and warrants that it has the unqualified authority to bind all such employees to the terms of the Agreement and this Addendum. If Provider has any arrangements with subcontractors, as defined in subsection (b), below, to render Health Services to Plan M+C Members, Provider shall ensure that all such subcontracts are duly amended to incorporate the terms contained in this Addendum through one of the methods described in subsections (b)(i) and (b)(ii) below.

(b) If Provider is an independent practice association, physician hospital organization, or other intermediary or network organization contracting on behalf of health care providers and/or facilities, Provider shall ensure that all arrangements with subcontractors for participation in Plan's M+C network of Participating Providers are in writing and duly executed. A "subcontractor" is defined as a person or entity that is contracted by

Provider, directly or through another person or entity, to provide Health Services to Plan M+C Members, and that does not hold a direct contract with Plan. Provider shall ensure that all agreements with subcontractors are duly amended to incorporate the terms contained in this Addendum through one of the following methods:

(i) If the subcontract contains language that permits a unilateral amendment, Provider shall unilaterally amend each subcontract to include the terms of this Addendum. Such amendment shall be distributed by certified mail, return receipt requested, or through some other comparably verified process, and copies of such amendments and the receipts must be mailed to Plan no later than July 1, 1999 in order for Plan to verify that these requirements have been implemented.

(ii) If the subcontract does not contain language that permits unilateral amendment, Provider shall obtain a signed amendment for each subcontract to include the terms of this Addendum. Copies of the amendments, executed by all parties, must be mailed to Plan no later than July 1, 1999 in order for Plan to verify that these requirements have been implemented.

(c) Provider shall ensure that the terms of this Addendum are included in all future and



pending agreements with subcontractors who agree to provide services to Plan M+C Members. Provider further agrees to promptly amend the agreements with subcontractors, in the manner requested by Plan, to meet any additional HCFA requirements. Refusal of any subcontractor to agree to the terms in this Addendum, and any subsequent amendments, shall be grounds for the termination of such subcontractor from the Plan M+C network of Participating Providers.

# UNITED HEALTHCARE OF COLORADO, INC.
# PHYSICIAN PARTICIPATION AGREEMENT

THIS AGREEMENT, effective on the date specified at the signature portion of this Agreement ("Effective Date"), is between United HealthCare of Colorado, Inc. ("Plan") and [handwritten: *Glenn L. Kelly, M.D. PC*] ("Physician") and sets forth the terms and conditions under which Physician shall participate in one of more networks of providers developed by Plan to render health care services to Members, as defined in this Agreement. On the Effective Date, this Agreement supersedes and replaces any existing agreements between the parties related to the provision of health care services to Members. This Agreement also supersedes and replaces any existing agreements between Physician and the following entities to the extent such agreements relate to the provision of health care services to Members, and to the extent such entities sponsor, issue or administer a Benefit Contract, as defined in this Agreement: The MetraHealth Insurance Company (MHIC), The Travelers Insurance Company, Metropolitan Life Insurance Company, and United Health and Life Insurance Company.

## SECTION 1

## Definitions

*Benefit Contract*: A benefit plan that includes health care coverage, is sponsored, issued or administered by Payor and contains the terms and conditions of a Member's coverage.

*Customary Charge*: The fee for health care services charged by Physician that does not exceed the fee Physician would charge any other person regardless of whether the person is a Member.

*Health Services*: The health-care services and supplies covered by the Member's Benefit Contract.



*Member*: An individual who is properly covered under a Benefit Contract.

*Member Expenses*: Any amounts that the Member's responsibility to pay Physician in accordance with the Member's Benefit Contract, including copayments, coinsurance and deductibles.

*Participating Provider*: A health care professional or facility, including Physician, that has a written participation agreement in effect with Plan, directly or through another entity, to provide Health Services to selected groups of Members.

*Payor*: The entity or person authorized by Plan to access one or more networks of Participating Providers developed by Plan and that has the financial responsibility for payment of Health Services covered by a Benefit Contract.

*Primary Care Physician*: A Doctor of Medicine ("*M.D.*"), Doctor of Osteopathy ("*D.O.*") or another health care professional as required by applicable statutes and regulations, who is duly licensed and qualified under the laws of the jurisdiction in which Health Services are rendered and is a Participating Provider of primary care Health Services.

*Referral Authorization*: The approval by a Member's Primary Care Physician in a format determined by Payor, which may be an electronic format, for a health care professional or facility to render certain Health Services to the Member.

*Referral Physician*: An M.D. or a D.O. (1) who is a Participating Provider; (2) who is not a Primary Care Physician; and (3) to whom a Member is referred by a Primary Care Physician for the provision of certain Health Services.

## SECTION 2

### Networks of Participating Providers

Physician shall provide Health Services to Members covered under the Benefit Contract types described in Exhibit 1, which may be modified from time to time by Plan, and which includes, but is not limited to, Benefit Contracts which offer a network of Participating Providers. When appropriate, Physician will be listed in the applicable provider directories.

## SECTION 3

### Duties of Physician

3.1 *Member Status.* To determine whether an individual is a Member and, therefore, entitled to receive Health Services, Physician shall ask the individual to present his or her identification card, which shall be provided to all Members and Payors, unless because of the type of Benefit Contract under which the Member has coverage no identification card applies. In addition, Physician may con-tact Plan to obtain Plan's most current information on the individual as a Member. However, Physician acknowledges that such information is subject to change retroactively (1) if Plan does not receive proper and timely notification regarding termination of a Member's coverage; (2) as a result of the Member's final decision regarding continuation of coverage pursuant to state and federal laws; or (3) if eligibility information Plan receives on the individual is later proven to be false. If Physician provides health care services to an individual, and it is later determined the individual was not a Member at the time the health care services were provided, those services shall not be eligible for payment under this Agreement. Physician may then directly bill the responsible party for such services.

3.2 *Provision of Health Services.* Physician shall provide Health Services to all Members as Physician's patient



load and appointment calendar permit and shall accept Members as new patients on the same basis as Physician is accepting non-Members as new patients without regard of race, religion, gender, color, national origin, age or physical or mental health status, or on any other basis deemed unlawful under federal, state or local law. At all times, Physician shall require employed or subcontracted healthcare professionals and facilities to comply with the protocols and requirements of Plan and Payor and the requirements of all applicable regulatory authorities. Such requirements include, but are not limited to, not billing Members for any amounts except Member Expenses and charges for services not covered under the Member's Benefit Contract.

3.3 *Utilization Management, Quality Improvement and Other Plan or Payor Programs.* Physician shall cooperate with all credentialing and recredentialing processes and all utilization management, quality improvement, peer review, Member grievance, on site review, or other similar Plan or Payor programs.

3.4 *Protocols.* Physician shall comply with protocols of Plan or Payor, including, but not limited to, the following:

3.4.1 Refer Members only to other Participating Providers unless otherwise authorized by Plan or Payor.

3.4.2 Be bound by any provider manual and credentialing plan, as modified from time to time by Plan or Payor.

3.4.3 Obtain prior authorization for certain Health Services as defined by Plan or Payor.

3.4.4 Follow approved billing procedures of Plan or Payor, as appropriate.

3.4.5 If Physician is a Primary Care Physician, Physician shall provide or arrange for the provision of advice and

assistance to Members in emergency situations 24 hours per day, 7 days per week.

3.4.6 If the Member's Benefit Contract requires the Member to receive certain Health Services from or upon referral by a Primary Care Physician, all Referral Physicians must adhere to the following additional protocols when those Health Services are provided:

1. Referrals to other Participating or non-Participating Providers must first be authorized by the Member's Primary Care Physician.

2. Health Services must be provided pursuant to the terms and limitations of the Referral Authorization.

3. Issued by or on the behalf of the Member's Primary Care Physician.

3.4.7 Physician shall comply with the following requirements when admitting Members to a hospital:

1. Admit Members on the day of surgery, unless the Member's medical condition requires otherwise and Physician has obtained prior authorization from Plan or Payor, as appropriate.

2. Notify Plan or Payor, as appropriate, by telephone at least 48 hours prior to a scheduled admission of a Member.

3. Notify Plan or Payor, as appropriate, immediately if Physician admits a Member to a hospital for an emergency or for observation.

4. If physician is a Referral Physician, Physician must also notify the Member's Primary Care Physician of all admissions in accordance with the above time frames.

Failure to comply with the above may result in denial of payment to Physician and/or termination of this Agreement. If any payment to Physician is denied due to Physician's



failure to comply with the above protocols, Physician shall not bill the Member for the denied amounts:

## SECTION 4

## Payment Provisions

4.1 *Payment.* For the provision of Health Services to a Member, Payor shall pay Physician the applicable amounts stated in the attached Appendices. The obligation for payment under this Agreement for Health Services rendered to a Member is solely that of Payor.

Physician shall accept in full for Health Services rendered to Members such amounts as are paid by Payor pursuant to this Agreement and shall not bill Members for non-covered charges which result from Payor's reimbursement methodologies. In no event shall Physician bill a Member for the difference between Customary Charges and the amount Physician has agreed to accept as full reimbursement under this Agreement. Physician may collect Member Expenses from the Member. If Payor denies payment for services rendered by Physician on grounds that the services are not medically necessary, as defined in the Member's Benefit Contract, Physician shall not collect payment from the Member for the services unless Physician first obtains the Member's written consent.

4.2 *Submission of Claims.* Physician shall submit claims for Health Services to Plan in a manner and format prescribed by Plan, which may be an electronic format. All information necessary to process the claims must be received by Plan no more than 90 days from the date the Health Services are rendered. Physician agrees that claims received after this time period may be rejected for payment, at Plan's and/or Payor's discretion.

Unless otherwise directed by Plan, Physician shall submit claims using current HCFA 1500 or UB92 forms, whichever

is appropriate, with applicable coding including, but not limited to, ICD9, CPT, Revenue and HCPCS coding. Physician shall include in a claim the Member number, Customary Charges for the Health Services rendered to a Member during a single instance of service, Physician's Federal Tax I.D. number and/or other identifiers requested by Plan.

Physician shall not bill the Member for Health Services if Physician fails to submit claims in accordance with the above provisions.

Payor shall have the right to make, and Physician shall have the right to request, corrective adjustments to a previous payment; provided, however, that Payor shall have no obligation to pay additional amounts after 12 months from the date the initial claim was paid.

4.3 *Coordination of Benefits.* Physician shall be paid in accordance with Payor's coordination of benefits rules.

4.4 *Financial Responsibility.* Plan shall notify Physician in writing if Plan determines that a Payor has failed to maintain its responsibility to pay for services rendered. Any services which have been rendered by Physician prior to and after such notification, and which were not paid for by Payor, shall be considered ineligible for reimbursement under this Agreement, and Physician may bill the Member directly for such services.

4.5 *Member Protection Provision.* This provision supersedes and replaces the Financial Responsibility section when Plan is the Payor, when required by a specific Payor other than Plan, or when required pursuant to applicable statutes and regulations.

In no event, including, but not limited to, non-payment by Payor for Health Services rendered to Members by Physician, insolvency of Payor, or breach by Plan of any term or



condition of this Agreement, shall Physician bill, charge, collect a deposit from, seek compensation, remuneration or reimbursement from, or have any recourse against any Member or persons acting on behalf of the Member for Health Services eligible for reimbursement under this Agreement; provided, however, that Physician may collect from the Member, Member Expenses or charges for services not covered under the Member's Benefit Contract.

The provisions of this section shall (1) apply to all Health Services rendered while this Agreement is in force; (2) with respect to Health Services rendered while this Agreement is in force, survive the termination of this Agreement regardless of the cause of termination; (3) be construed to be for the benefit of the Members; and (4) supersede any oral or written agreement, existing or subsequently entered into, between Physician and a Member or person acting on a Member's behalf, that requires the Member to pay for such Health Services.

## SECTION 5

## Liability of Parties, Laws, Regulations and Licenses

5.1 *Physician Liability Insurance.* Physician shall procure and maintain, at Physician's sole expense, (1) medical malpractice insurance in the amounts of One Million Dollars ($1,000,000.00) per occurrence and Three Million Dollars ($3,000,000.00) aggregate, and (2) comprehensive general and/or umbrella liability insurance in the amount of One Million Dollars ($1,000,000.00) per occurrence and aggregate. Physician shall also require that all health care professionals employed by or under contract with Physician to render Health Service to Members procure and maintain malpractice insurance, unless they are covered under Physician's insurance policies. Physician's and other health care professionals' medical malpractice insurance shall be either occurrence or claims made with an extended period

reporting option under such terms and conditions as may be reasonably required by Plan. Prior to the Effective Date of this Agreement and at each policy renewal thereafter, Physician shall submit to Plan in writing evidence of insurance coverage.

5.2 *Laws, Regulations and Licenses.* Physician shall maintain all federal, state and local licenses, certifications and permits, without material restriction, which are required to provide health care services according to the laws of the jurisdiction in which Health Services are provided, and shall comply with all applicable statutes and regulations. Physician shall also require that all health care professionals employed by or under contract with Physician to render Health Services to Members, including covering physicians, comply with this provision.

## SECTION 6

## Notices

Physician shall notify Plan within 10 days of knowledge of the following:

6.1 Changes in liability insurance carriers, termination of, renewal of or any other material changes in Physician's liability insurance, including reduction of limits, erosion of aggregate, changes in retention or non-payment of premium.

6.2 Action which may result in the suspension, revocation, condition, limitation, qualification or other material restriction on Physician's licenses, certificates or permits by any government under which Physician is authorized to provide health care services; and, of any suspension, revocation, condition, limitation, qualification or other material restriction of Physician's staff privileges at any licensed hospital, nursing home or other facility at which Physician has staff privileges during the term of this Agreement.

6.3 A change in Physician's name, ownership or Federal Tax I.D. number.



6.4 Indictment, arrest or conviction for a felony or for any criminal charge related to the practice of Physician's profession.

Unless otherwise specified in this Agreement, any notice or other communication required or permitted shall be in writing. All written notices or communication shall be deemed to have been given when delivered in person; or, if delivered by first-class United States mail, on the date mailed, proper postage prepaid and properly addressed to the appropriate party at the address set forth at the signature portion of this Agreement or to another more recent address of which the sending party has received written notice. The parties shall provide each other with proper addresses of all designees that should receive certain notices or communication instead of that party.

## SECTION 7

## Records

7.1 *Confidentiality of Records.* Plan and Physician shall maintain the confidentiality of all Member records in accordance with any applicable statutes and regulations.

7.2 *Maintenance of and Plan Access to Records.* Physician will maintain adequate medical, financial and administrative records related to Health Services rendered by Physician under this Agreement. In order to perform its utilization management and quality improvement activities, Plan shall have access to such information and records, including claims records, within 14 days from the date the request is made, except that, in the case of an audit by Plan such access shall be given at the time of the audit. If requested by Plan, Physician shall provide copies of such records free of charge. Unless a longer time period is required by applicable statutes or regulations, Plan shall have access to and the right to audit information and records during the term of this Agreement and for 3 years following its

termination. It is Physician's responsibility to obtain any Member consent required in order to provide Plan with requested information and records or copies of records.

7.3 *Government and Accrediting Agency Access to Records.* The federal, state and local government, or accrediting agencies including, but not limited to, the National Committee for Quality Assurance (the "*NCQA*"), and any of their authorized representatives, shall have access to, and Plan and Physician are authorized to release, in accordance with applicable statutes and regulations, all information and records or copies of such, within the possession of Plan or Physician, which are pertinent to and involve transactions related to this Agreement if such access is necessary to comply with accreditation standards, statutes or regulations applicable to Plan, Payor or Physician.

## SECTION 8

## Resolution of Disputes

Plan or Payor and Physician will work together in good faith to resolve any disputes about their business relationship. If the parties are unable to resolve the dispute within 30 days following the date one party sent written notice of the dispute to the other party, and if Plan, Physician or any Payor that has consented in writing to binding arbitration wishes to pursue the dispute, it shall be submitted to binding arbitration in accordance with the rules of the American Arbitration Association. In no event may arbitration be initiated more than one year following the sending of written notice of the dispute. Any arbitration proceeding under this Agreement shall be conducted in Arapahoe County, Colorado. The arbitrators may construe or interpret but shall not vary or ignore the terms of this Agreement, shall have no authority to award any punitive or exemplary damages, and shall be bound by controlling law. If the dispute pertains to a matter which is generally administered by certain Plan procedures,



such as a credentialing or quality improvement plan, the procedures set forth in that plan must be fully exhausted by Physician before Physician may invoke his or her right to arbitration under this section. The parties acknowledge that because this Agreement affects interstate commerce the Federal Arbitration Act applies.

## SECTION 9

## Term and Termination

9.1 *Term.* This Agreement shall begin on the Effective Date and it shall remain in effect for one year, and shall automatically renew for successive 1-year terms until it is terminated as provided below.

9.2 *Termination.* This Agreement may be terminated as follows:

9.2.1 by mutual agreement of Plan and Physician.

9.2.2 by either party upon 90 days prior written notice to the other party.

9.2.3 by either party, in the event of a breach of this Agreement by the other party, upon 30 days prior written notice to the other party.

9.2.4 by Plan immediately upon written notice to Physician, due to Physician's loss or suspension of licensure or certification, or loss of insurance required under this Agreement.

9.2.5 by Physician upon 60 days prior written notice to Plan due to an amendment made to this Agreement pursuant to section 10.1.

9.2.6 by Plan in accordance with its credentialing process.

Plan shall have the right to notify Members of the termination of this Agreement.

## SECTION 10

## Miscellaneous

10.1 *Amendment.* Plan may amend this Agreement by sending a copy of the amendment to Physician at least 30 days prior to its effective date. The signature of Physician shall not be required. Plan may also amend this Agreement to comply with the requirements of state and federal regulatory authorities, and shall give written notice to Physician of such amendment and its effective date. Unless such regulatory authorities direct otherwise, the signature of Physician will not be required.

10.2 *Assignment.* Plan may assign all or any of its rights and responsibilities under this Agreement to any entity controlling, controlled by or under common control with Plan. Physician may assign any of his or her rights and responsibilities under this Agreement to any person or entity only upon the prior written consent of Plan, which consent shall not be unreasonably withheld.

10.3 *Administrative Responsibilities.* Plan may delegate certain administrative responsibilities under this Agreement to another entity, including, but not limited to, Payor or its designee. In addition, certain Payor responsibilities may actually be performed by its designee.

10.4 *Relationship Between Plan and Physician.* The relationship between Plan and Physician is solely that of independent contractors and nothing in this Agreement or otherwise shall be construed or deemed to create any other relationship, including one of employment, agency or joint venture.

10.5 *Name, Symbol and Service Mark.* During the term of this Agreement, Physician, Plan and Payor shall have the right to use each other's name solely to make public reference to Physician as a Participating Provider. Physician, Plan and



Payor shall not otherwise use each other's name, symbol or service mark without prior written approval.

10.6 *Confidentiality.* Neither party shall disclose to third parties any confidential or proprietary business information which it receives from the other party, including, but not limited to, financial statements, business plans, protocols and programs; except that (1) Physician may disclose information to a Member relating to the Member's treatment plan and the payment methodology, but not specific rates, and (2) Plan may disclose certain terms to Payors or designees that need the information to process claims or administer a Benefit Contract, and may file the form of this Agreement with any federal or state regulatory entity as may be required by applicable law.

10.7 *Communication.* Plan encourages Physician to discuss with Members treatment options and their associated risks and benefits, regardless of whether the treatment is covered under the Member's Benefit Contract. Nothing in this Agreement is intended to interfere with Physician's relationship with Members as patients of Physician, or with Plan's ability to administer its quality improvement, utilization management and credentialing programs.

A. No Physician covered by this contract shall be prohibited from processing or expressing disagreement with a medical decision, medical policy, or medical practice of Plan or an entity representing or working for the Plan (e.g., a utilization review company).

B. Plan or an entity representing or working for the Plan shall not be prohibited from protesting or expressing disagreement with a medical decision, medical policy, or medical practice of the Physician covered by this contract.

C. Plan shall not terminate this contract because the Physician covered by this contract expresses disagreement with a decision by Plan or an entity representing or working

for such Plan to deny or limit benefits to a Member or because the Physician assists the Member to seek reconsideration of the Plan's decision, or because a Physician discusses with a current, former, or prospective patient any aspect of the patient's medical condition, any proposed treatments or treatment alter-natives, whether covered by the Member's Benefit Contract or not, policy provisions of a Member's Benefit Contract or a Physician's personal recommendation regarding selection of a health plan based on the Physician's personal knowledge of the health needs of such patients.

10.8 *Appendices.* Additional and/or alternative provisions, if any, related to certain Health Services rendered by Physician to Members covered by certain Benefit Contracts are set forth in the Appendices.

10.9 *Entire Agreement.* This Agreement constitutes the entire agreement between the parties in regard to its subject matter.

10.10 *Governing Law.* This Agreement shall be governed by and construed in accordance with applicable state law and ERISA.

10.11 Medicaid Members. If a Medicaid Appendix is attached to this Agreement Physician agrees to provide Health Services to Members enrolled in a Benefit Contract for Medicaid recipients and to comply with any additional requirements set forth in the Medicaid Appendix.

10.12 *Medicare Members.* If a Medicare Appendix is attached to this Agreement, Physician agrees to provide Health Services to Members who are enrolled in a Benefit Contract for Medicare beneficiaries. Physician also understands that Plan's agreements with Participating Providers are subject to review and approval by the Health Care Financing Administration ("HCFA").



THIS AGREEMENT CONTAINS A BINDING ARBITRATION PROVISION THAT MAY BE ENFORCED BY THE PARTIES.

The Effective Date of this Agreement is [handwritten: *5-5-97*] .

United HealthCare of Colorado, Inc
6251 Greenwood Plaza Boulevard.
Englewood, CO 80111
Signature [handwritten signature: *Terry L. Nimnicht*]
Print Name [typewritten: *Terry L. Nimnicht*]
Title [typewritten: *C.E.O.*]
Date [handwritten: *5-5-97*]

[handwritten: *Glenn L. Kelly, MD*]
[handwritten: *601 E. Hampden Av*]
[handwritten: *Englewood, CO 80110*]
(Name and Address of Physician)
Signature [handwritten signature: *Glenn L. Kelly*]
Print Name [handwritten: *Glenn L. Kelly, M.D.*]
Date [handwritten: *4-30-97*]
TIN # [*handwritten: 84-0827902*]

## EXHIBIT 1

## NETWORKS OF PARTICIPATING PROVIDERS

Physician shall participate in the networks of Participating Providers established by Plan for the Benefit Contract types identified below:

- Benefit Contracts where Members are offered a network of Participating Providers and must select a Primary Care Physician. The Primary Care Physician coordinates the Member's care and approves the rendering of Health Services to Members by other providers. An option for this Benefit Contract allows the Member to receive Health Services from a Participating or non-Participating Provider, without the approval of the Primary Care Physician.
- Benefit Contracts where Members are offered a network of Participating Providers but are not required to select a Primary Care Physician. The Member may receive Health Services from a Participating Provider of his or her choice. An option for this Benefit Contract allows the Member to receive Health Services from non-Participating Providers.
- Benefit Contracts where Members are not offered a network of Participating Providers from which they may receive Health Services.
- Benefit Contracts for Medicare Members.
- Benefit Contracts for Medicaid Members.



## ALL PAYOR APPENDIX

## FEE MAXIMUM

### APPLICABILITY

Unless another Appendix to this Agreement applies specifically to certain Members, the provisions of this Appendix apply to Health Services rendered by Physician to Members covered by Benefit Contracts sponsored, issued or administered by all Payors.

### SECTION 1

### Definitions

*Fee Maximums*: The maximum fees for Health Services rendered by Participating Providers, as determined from time to time by Plan. The Fee Maximums for the same Health Service rendered pursuant to different Benefit Contracts may vary. Samples of the most recent Fee Maximums are attached as Exhibit 2.

### SECTION 2

### Payment

Payor shall pay Physician for Health Services rendered to a Member the lesser of (1) Physician's Customary Charge, less any applicable Member Expenses, or (2) the Fee Maximum for such Health Services, less any applicable Member Expenses as listed in Exhibit 2.

UNITED HEALTHCARE OF COLORADO
SPC FEE SCHEDULE EXHIBIT 2

| | |
|---|---|
| Anesthesiology | $32.00 |
| Obstetrics | $1,800 global fee |
| MRI/CT reading | $100.00 |
| Lab | National Reference Lab Fee Schedule |
| Physical Therapy | National Therapy Fee Schedule |

For POS/PPO patients: All tests allowed in office.
For all HMO patients: The following tests may be performed in office:

| | | | | |
|---|---|---|---|---|
| 81000 | 81001 | 81002 | 81003 | 81025 |
| 82270 | 82947 | 82948 | 85048 | 86403 |
| 87220 | 85204 | 85014 | 85018 | 85021 |
| 85022 | 85023 | 85025 | 86588 | 87081 |
| 87210 | 87220 | 88300-88309 Dermatologists only) | | |
| 85060 (Hematologists only) | | | | |

All other tests should be sent to Corning and will be declined if performed in office.

| | | | | |
|---|---|---|---|---|
| Immunizations: | 90708-90712 | $30.00 | 90735 | $20.00 |
| | 90726 | $40.00 | 90733 | $30.00 |
| | 90727 | $20.00 | 90732 | $30.00 |
| | 90728-90730 | $40.00 | 90731 | $40.00 |
| | 90742 | $50.00 | 90700-90701 | $30.00 |
| | 90702-90703 | $15.00 | 90707 | $50.00 |
| | 90713-90714 | $20.00 | 90716 | $50.00 |
| | 90717 | $30.00 | 90718-90719 | $20.00 |
| | 90724-90725 | $20.00 | 90737-90741 | $30.00 |



| | | | | |
|---|---|---|---|---|
| Primary codes: | 99381 | $64.32 | 99393 | $49.94 |
| | 99382 | $64.32 | 99394 | $50.51 |
| | 99383 | $55.10 | 99395 | $55.10 |
| | 99384 | $55.10 | 99396 | $59.70 |
| | 99385 | $73.47 | 99397 | $68.88 |
| | 99386 | $78.02 | 99391 | $36.73 |
| | 99387 | $87.19 | 99392 | $36.73 |

Remainder of reimbursement will be based on 1997 RBRVS at a following conversion factors with a Medicare applied Colorado geographical adjustment of .97:
Primary codes $38.63 Surgical codes $44.24 Non-surgical codes $36.55

MEDICARE APPENDIX
FEE MAXIMUM

## APPLICABILITY

The provisions of this Appendix apply Health Services rendered by Physician to Members covered by Benefit Contracts sponsored or issued by (1) Plan pursuant to its risk contract with the Health Care Financing Administration ("*Plan Medicare Members*"), and (2) a health plan affiliated with Plan, either by common ownership or control or through a written agreement. ("*Affiliated Health Plan*") pursuant to its contract with the Health Care Financing Administration ("*Affiliated Medicare Members*").

### SECTION 1
### Definitions

*Fee Maximums*: The maximum fees for Health Services rendered by Participating Providers to Plan Medicare Members, as determined from time to time by Plan. A sample of the most recent Fee Maximum schedule is attached as Exhibit 3.

### SECTION 2
### Payment

1. Payor shall pay Physician for Health Services rendered to Plan Medicare Member the lesser of (1) Physician's Customary Charge, less any applicable Member Expenses, or (2) the Fee Maximum for such Health Services, less any applicable Member Expenses as listed in Exhibit 3.

2. For the provision of Health Services to Affiliated Medicare Members, Physician shall be paid by the Affiliated Health Plan the applicable Medicare allowable rates for such Health Services, less any applicable Member Expenses, which shall be collected by Physician directly from the Affiliated Medicare Members.



UNITED HEALTHCARE MEDICARE FEE SCHEDULE
EXHIBIT 3

Reimbursement will be based on 1997 Medicare at the following conversion factors:

Specialist Physicians

| | |
|---|---|
| Surgical | $36.86 |
| Non-surgical | $30.46 |
| Primary codes | $32.18 |

The following payment will be used in those areas that do not reflect Medicare set allowables:

- Lab tests will be reimbursed at the national contracted lab allowables.
- Drugs, medications and immunizations will be reimbursed at AWP.
- Durable medical equipment, home care and infusion (all hcpcs codes) will be reimbursed at the national contracted dme/home care allowables.
- Preventive codes are United HealthCare modified RVU's.

| | | | | |
|---|---|---|---|---|
| Immunizations: | 90708-90712 | $30.00 | 90735 | $20.00 |
| | 90726 | $40.00 | 90733 | $30.00 |
| | 90727 | $20.00 | 90732 | $30.00 |
| | 90728-90730 | $40.00 | 90731 | $40.00 |
| | 90742 | $50.00 | 90700-90701 | $30.00 |
| | 90702-90703 | $15.00 | 90707 | $50.00 |
| | 90713-90714 | $20.00 | 90716 | $50.00 |
| | 90717 | $30.00 | 90718-90719 | $20.00 |
| | 90724-90725 | $20.00 | 90737-90741 | $30.00 |

## PHYSICIAN GAINSHARING PROGRAM

Physicians may be eligible for the gainsharing program. This program is intended to be used to make available an extra payment for those Providers who meet standards for high quality, cost effective care. Any gainsharing is contingent upon the profitability of United HealthCare as a whole. The size of the gainsharing pool to be distributed is contingent upon the profitability of United HealthCare's Medicare Risk book of business.

Gainsharing eligibility in the plan is limited to those Providers who are accepting all new beneficiaries on an ongoing basis. Gainsharing is based on the physician meeting the performance measures and will be distributed up to 10% of the available pool.

Performance Measures

| | | |
|---|---|---|
| A. | Quality of Care and Service | 8% |
| B. | Adherence to Protocols and Practices | 2% |
| | Total | 10% |

Quality of Care and Service:

- Adult Preventative Assessment > 90% 1/2%
- Medical Record Review Score > 85% 1/2%
- Plan meets monthly with physician subgroup to discuss
- quality initiatives 1/2%
- member specific quality of care issues 1/2%
- utilization patterns, specifically regarding 1/2%
- under and over utilization trends
- Member grievances less than 1.00 per 1000 1%
- members
- Disenrollment less than 4% 1%
- Appointment availability
- no informal complaints regarding availability 1/2%
- no formal complaints nor grievances regarding 1/2%
- availability



- plan on site survey indicates appropriate 1/2%
- availability
- On site survey score greater than 90% 1%
- Cooperate with Physician subgroup's initiatives or recommendations 1%
- Adherence to Protocols and Practices:
- No repeated incidents of provider non-compliance 1%
- No incidents of referral out of network 1%

In its sole discretion, United HealthCare reserves the sole right to change or modify the distribution of any gainsharing including all criteria and its weighting. United HealthCare also reserves the right to terminate the gainsharing program at any time without notice.

MEDICAID APPENDIX
FEE MAXIMUM

## APPLICABILITY

The provisions of this Appendix to apply to Health Services rendered by Medical Group to Members covered by Benefit Contracts sponsored or issued by (1) Plan pursuant to its risk contract with the State Medicaid Agency ("*Plan Medicaid Members*"), and (2) a health plan affiliated with Plan, either by common ownership or control or through a written agreement, ("*Affiliated Health Plan*") pursuant to its contract with the State Medicaid Agency ("*Affiliated Medicaid Members*"). Participating Providers will not close their practice to Plan Medicaid Members until 200 Plan Medicaid Members are enrolled with the Participating Provider.

## SECTION 1
Definitions

*Fee Maximums*: The maximum fees for Health Services rendered by Participating Providers to Plan Medicaid Members, as determined from time to time by Plan. A sample of the most recent Fee Maximum schedule is attached as Exhibit 4.

## SECTION 2
Payment

1. Payor shall pay Medical Group for Health Services rendered to Plan Medicaid Member the lesser of (1) Medical Group's Customary Charge, less any applicable Member Expenses, or (2) the Fee Maximum for such Health Services, less any applicable Member Expenses as listed in Exhibit 4.

2. For the provisions of Health Services to Affiliated Medicaid Members, Medical Group shall be paid by the Affiliated Health Plan the applicable Medicaid allowable



rates for such Health Services, less any applicable Member Expenses, which shall be collected by Medical Group directly from the Affiliated Medicaid Members.

United Healthcare Medicaid Fee Schedule

Exhibit 4

Reimbursement will be based on 1997 Medicare at the following conversion factors:

Specialist Physicians

| | |
|---|---|
| Surgical | $32.76 |
| Non-surgical | $27.07 |
| Primary codes | $28.60 |

The following payment will be used in those areas that do not reflect Medicare set allowables:

- Lab tests will be reimbursed at the national contracted lab allowables.
- Drugs, medications and immunizations will be reimbursed at AWP.
- Durable medical equipment, home care and infusion (all hcpcs codes) will be reimbursed at the national contracted dme/home care allowables.
- Preventative codes are United HealthCare modified RVU's.

| | | | | |
|---|---|---|---|---|
| Immunizations: | 90708-90712 | $30.00 | 90735 | $20.00 |
| | 90726 | $40.00 | 90733 | $30.00 |
| | 90727 | $20.00 | 90732 | $30.00 |
| | 90728-90730 | $40.00 | 90731 | $40.00 |
| | 90742 | $50.00 | 90700-90701 | $30.00 |
| | 90702-90703 | $15.00 | 90707 | $50.00 |
| | 90713-90714 | $20.00 | 90716 | $50.00 |
| | 90717 | $30.00 | 90718-90719 | $20.00 |
| | 90724-90725 | $20.00 | 90737-90741 | $30.00 |

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No. 02-215

IN THE

# Supreme Court of the United States

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PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
*Petitioners*,

v.

JEFFREY BOOK, D.O., *et al.*,
*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## PETITIONERS' BRIEF

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59 pp

## QUESTION PRESENTED

Whether a district court must compel arbitration of a plaintiff's RICO claims under a valid arbitration agreement when that agreement contains limitations on statutorily available remedies.

## PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were (a) plaintiffs-appellees Jeffrey Book, D.O., Dennis Breen, M.D., Michael Burgess, M.D., Edward L. Davis, D.O., Glenn L. Kelly, M.D., Manual Porth, M.D., and Charles B. Shane, M.D., and (b) defendants-appellants Foundation Health Systems, Inc., n/k/a Health Net, Inc., PacifiCare Health Systems, Inc., n/k/a PacifiCare Health Plan Administrators, Inc., The Prudential Insurance Company of America, UnitedHealth Group Incorporated, f/k/a United HealthCare Corporation, UnitedHealthcare, Inc., and WellPoint Health Networks Inc. This brief on the merits is being filed on behalf of petitioners UnitedHealth Group Incorporated, UnitedHealthcare, Inc., PacifiCare Health Systems, Inc., and PacifiCare Operations, Inc. The corporate disclosure statement for these entities is contained in the petition for writ of certiorari and is incorporated by reference. No amendments to that statement are needed to make the statement current.

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IN THE

# Supreme Court of the United States

No. 02-215

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
*Petitioners*,

v.

JEFFREY BOOK, D.O., *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITIONERS' BRIEF

Petitioners respectfully request the Court to reverse the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A10) is reported at 285 F.3d 971. The relevant decisions of the district court (Pet. App. A11-A46, A47-A54) are reported at 143 F.Supp.2d 1371 and 132 F.Supp.2d 989.

## JURISDICTION

The Court has jurisdiction under 28 U.S.C. §1254(1). The court of appeals issued its judgment on March 14, 2002, and denied a petition for rehearing or rehearing *en banc* on June 21, 2002. Pet. App. A55-A56. Petitioners timely filed their petition for writ of certiorari on August 6, 2002.

## FEDERAL STATUTES INVOLVED

This case involves §§2, 4, 10, and 11 of the Federal Arbitration Act (FAA), 9 U.S.C. §1 *et seq.*, and §1964 of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 *et seq.* The text of these provisions is set out in the appendix to this brief.

## STATEMENT

This case is a consolidated multi-district litigation that was initially filed by a group of physicians accusing managed health care organizations, with whom they had contracted, of not properly paying claims they had submitted. This lawsuit was brought in violation of the physicians' arbitration agreements, and they have concomitantly sought to expand the litigation by effectively nullifying the application of thousands of arbitration agreements by which physicians have contractually bound themselves to resolve their disputes through arbitral proceedings.[1]

United and PacifiCare process hundreds of millions of claims each year, and it is inevitable that disputes occasionally will arise with physicians regarding the disposition of some of those claims. Given the sheer volume of claims, it is essential for petitioners to have an effective dispute resolution mechanism that appropriately balances the parties' interests in fairness and efficiency. To that end, petitioners have internal grievance processes that address physician complaints about the treatment of claims. Issues that are not resolved at that level may be submitted to internal appeals processes. A physician may initiate an arbitration proceeding to resolve any remaining issues only when neither

[1] Subsequent to the orders that are the subject of this proceeding, the district court certified a nationwide plaintiff class of approximately 600,000 physicians. The court of appeals has granted a Rule 23(f) petition to review that decision, and issues relating to class treatment of arbitrable claims are not currently before the Court.



the grievance process nor the appeals process is successful. Typically, physicians who contract with United and PacifiCare execute an agreement to handle their disputes through this nonlitigation mechanism.

In addition to their vast superiority in efficiency, petitioners' grievance-appeal-arbitration processes also control litigation costs, ensuring a cost-effective means of resolving disputes without many of the costs and risks associated with prolonged litigation. The cost of litigating with a physician over even a single claim can be onerous, and the risk of jury verdicts far out of proportion to the amount of the claim is substantial. As the Court has cogently observed, "The reasons for favoring arbitration are as wise as they are obvious: litigation is costly and time consuming . . . ."[2]

Respondents Glenn Kelly, M.D., and Manual Porth, M.D., individually or as members of larger physician groups, entered into physician agreements with United. Those agreements contained arbitration provisions under which Drs. Kelly and Porth agreed to submit "any disputes about their business relationship" with United "to binding arbitration." J.A.168, 212. Each agreement also sought to limit any arbitration award of punitive or exemplary damages. J.A.168, 212 (Dr. Kelly's arbitration agreement with United limited the arbitrator's ability to award "punitive or exemplary damages"); J.A.212 (Dr. Porth's arbitration agreement with United limited the arbitrator's ability to award "extracontractual damages of any kind, including punitive or exemplary damages"); J.A.168.

Respondents Jeffrey Book, D.O., and Dennis Breen, M.D., individually or as members of larger physician groups, were similarly bound by their physician contracts to arbitrate

[2] *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 747 (1981) (Burger, C. J., dissenting).

disputes with PacifiCare.[3] The PacifiCare agreements required Drs. Book and Breen to arbitrate "any controversy" "arising out of" their respective agreements, and further stated that the "arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by [State] law, except that punitive damages shall not be awarded." J.A.84, 106-07, 146-47.

Respondents disregarded their contractual commitments to arbitrate when they sued petitioners and others on August 14, 2000. R.167.1.[4] Respondents claimed to be "victims of a scheme implemented by Defendants in violation of the Racketeer Influenced and Corrupt Organization Act (RICO)," *id.*, at 2, and they also alleged various other federal and state-law causes of action, including claims for breach of contract and quantum meruit. The defendants, including petitioners, timely moved the district court to compel respondents to arbitrate all of their claims. *See* R.320.6-7; R.421.6-7; R.583.11-16, 18.

The district court granted in part and denied in part the various defendants' motions to compel arbitration. *See In re Managed Care Litig.*, 132 F.Supp.2d 989, 992 (S.D. Fla. 2000). The district court held that petitioners' arbitration agreements were generally enforceable and sufficiently broad to encompass respondents' claims against petitioners.[5] But,

[3] Breen is not a named plaintiff in the most recent amended complaint, but he is a member of the certified class and is still the subject of an order granting and denying arbitration, on which the Court granted a writ of certiorari. Moreover, respondents are seeking leave to file another amended complaint that does list Breen as a named plaintiff.

[4] Citations to the underlying record will reference the docket number and relevant page numbers.

[5] The district court correctly held that so long as respondents' "allegations 'touch matters' covered by the arbitration agreement, then those claims must be arbitrated, irrespective of how the allegations are labeled." *In re Managed Care Litig.*, 132 F.Supp.2d, at 993. The district court held that respondents' allegations (including their RICO allegations)



while recognizing that RICO claims are subject to arbitration, the district court declined to compel respondents to arbitrate their RICO claims because it held that they could not obtain "meaningful relief" in arbitration on those claims as a result of the damage limitation provisions. *Id.*, at 1000-01, 1005. Rather than limiting its review to questions of arbitrability, the district court chose to examine the arbitration agreements' damage limitation provisions; interpreted those provisions to preclude an award of RICO treble damages (even though no provision expressly says that); and held that, because the damage limitation provisions did not permit "meaningful relief" in arbitration, respondents would be completely relieved of their obligation to arbitrate their RICO claims. *Id.*; *see also In re Managed Care Litig.*, 143 F.Supp.2d 1311, 1375 (S.D. Fla. 2001).

The court of appeals affirmed the district court's holding that respondents were not required to arbitrate their RICO claims because they could not obtain RICO treble damages in arbitration. *See In re Humana Managed Care Litig.*, 285 F.3d 971, 973-74 (CA11 2002) ("We affirm in its entirety the district court's order for the reasons set forth in its comprehensive opinion found at 132 F.Supp.2d 989 (S.D. Fla. 2000).").

## SUMMARY OF ARGUMENT

The Court should reject the lower courts' attempt in this case to significantly enlarge the gatekeeping function that the courts necessarily perform when asked to compel arbitration. The Court has properly limited the courts' function in determining a motion to compel arbitration to determining: (1) whether the parties are bound by an arbitration agreement whose scope covers the parties' dispute, (2) whether under §2

"touch[ed] matters" relating to their arbitration agreements. *Id.*, at 1000 n.3, 1001 n.4, 1005 n.9. Respondents did not dispute those conclusions on appeal.

of the FAA there are grounds at law or equity justifying the revocation of the arbitration agreement, and (3) when a federal statutory claim is asserted, whether Congress has expressed a clear intent that such a claim not be arbitrated at all.

In this case, none of those factors would prevent arbitration, and the Court should not weaken the protections of the FAA by empowering judges to abrogate private arbitration agreements simply by finding fault with previously agreed-upon provisions in those agreements limiting arbitral procedures or remedies. The interpretation and enforcement of those provisions is well within the scope of the arbitrator's contractually assigned role, and those decisions are best made in the first instance by the arbitrator as part of the overall arbitral process. An expansion of the courts' role at the motion-to-compel stage to evaluate the terms under which the parties agreed to arbitrate would upset the contractual expectations of the party seeking arbitration—by shifting to the court determinations intended for the arbitrator—and would severely frustrate the FAA's support for arbitration by significantly delaying the mechanism through which the FAA enforces arbitration. That kind of prearbitration scrutiny also would dramatically expand the limited prearbitration review authorized by §§2 and 4 of the FAA and impinge upon the broader postarbitration review envisioned under §§10 and 11 of the Act. The Court has repeatedly noted that postarbitration review is sufficient to ensure that an arbitrator has complied with the controlling law.

A party who believes that a remedial limitation is not valid may assert that contention before the arbitrator, who is bound to apply controlling law. Allowing district courts to evaluate such provisions in the first instance not only usurps the role



of the arbitrator, but also exhibits a strong distrust of the arbitral process because it improperly presupposes that arbitrators will not, or cannot, correctly apply the law in assessing challenges to remedial limitations in arbitration agreements.

But even assuming that the lower courts could properly undertake to evaluate the damage limitation provisions in petitioners' arbitration agreements at the motion-to-compel stage, those provisions did not impermissibly restrict respondents' RICO remedies in arbitration so as to excuse respondents from arbitrating their RICO claims altogether. RICO treble damages were not intended to be primarily punitive, and even if there were some uncertainty on that account, the strong presumption favoring arbitration should have required the district court to adopt an interpretation of the damage limitation provisions that would permit arbitration. Most importantly, commercial parties may freely contract to restrict available remedies, including extracontractual and punitive damages, whether in an arbitration clause or elsewhere in a contract. And, finally, even if the damage limitation provisions were not themselves enforceable against RICO claims, the proper remedy would have been to restrict the applicability of the damage limitation provisions, not to strike the parties' agreement to arbitrate the RICO claims altogether.

## ARGUMENT

### I. ARBITRATORS, NOT COURTS, SHOULD ADDRESS THE VALIDITY OF ARBITRAL LIMITATIONS ON REMEDIES IN THE FIRST INSTANCE.

In 1925, Congress enacted what is now known as the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* (FAA). The text, legislative history, and consistent judicial interpretation of the FAA illustrate that Congress intended the Act to provide a

legal basis for the enforcement of arbitration agreements that would limit the courts' involvement in the arbitration process.

### A. Congress Enacted a Limited Role for Courts in Enforcing Arbitration Agreements.

The FAA was intended to end judicial hostility toward arbitration agreements and to strengthen enforcement of contractual agreements to arbitrate. *Gilmer* v. *Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1991); *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974). At the core of the Act is Congress's belief that agreements to arbitrate are, in and of themselves, "business contracts" that should be enforced by the courts in the same manner as any other business contract would be enforced. "An agreement for arbitration is in its essence a business contract. It differs in no essential [respect] from other commercial agreements. It should stand upon the same plane and be regarded by the law in the same light . . . ." *Arbitration of Interstate Commercial Disputes, Joint Hearings Before the Subcomms. of the Comms. on the Judiciary, Congress of the United States, on S. 1005 and H.R. 646*, 68th Cong. 38 (1924).

Congress's mandate that courts end their historical hostility toward arbitration and treat arbitration agreements like other commercial or business contracts is clear from the language of the FAA, and in particular §2, the "primary substantive provision" of the FAA. *See Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Section 2 provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any contract*." 9 U.S.C. §2 (emphasis added). That section declares "a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24; *see Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625



(1985) ("The 'liberal federal policy favoring arbitration agreements' manifested by [§2] and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements . . . .") (internal citations omitted).

In enacting §2, Congress sought to end the days when a party could agree to arbitrate a dispute according to specific terms and then, having the dispute come to fruition, change its mind and simply walk away from the agreement without repercussion. *See* H.R. REP. NO. 68-96, at 2 (1924). Absent a valid defense to the core agreement to arbitrate, like fraud, duress, mistake, or other common-law contract defenses, Congress intended arbitration agreements to be enforced like other contracts. *See Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

Congress did not want parties objecting to arbitration to be able to force lengthy court proceedings, at great expense, over whether they have to arbitrate. On the contrary, the FAA was designed to reflect a "statutory policy of rapid and unobstructed enforcement of arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S., at 23. A party should not be permitted "to ignore the [arbitration] contract and resort to the courts" precisely because "[s]uch a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984); *see also Moses H. Cone Mem'l Hosp.*, 460 U.S., at 22 ("Congress' clear intent" in the FAA was "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible"); *Prima Paint*, 388 U.S., at 404 (discussing the "unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts").

To achieve swift resolution of controversies regarding the enforcement of an arbitration agreement, Congress indicated

that a court's role in reviewing an arbitration agreement should be limited to examining (1) whether the dispute is within the scope of the parties' arbitration agreement; (2) whether the agreement to arbitrate is revocable on grounds at law or in equity; and (3) when one of the parties asserts a federal statutory claim, whether Congress has clearly expressed an intent that the statutory claim not be arbitrated. *See Mitsubishi*, 473 U.S., at 628; *Southland Corp.*, 465 U.S., at 10-11.

> "The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed in arbitration in accordance with the terms of the agreement." 9 U.S.C. §4.

Congress wanted arbitrators, not courts, to hear and determine any issues beyond challenges to the making or scope of arbitration agreements. Because "arbitration is strictly a matter of contract, the parties to an arbitration agreement [are] 'at liberty to choose the terms under which they will arbitrate.'" *Volt Info. Sciences, Inc.* v. *Bd. of Trustees*, 489 U.S. 468, 472 (1989) (citations omitted).

Courts can give effect to this important federal policy favoring arbitration only by refraining—at the motion-to-compel stage—from additional inquiries into the meaning and significance of procedural or remedial limitations in an otherwise enforceable arbitration agreement and leaving those determinations to the arbitrator in the first instance. Unless the party objecting to arbitration can establish that the arbitration agreement may be revoked under §2 or that Congress has categorically expressed its intent that certain federal statutory claims not be arbitrable, the court should enforce the agreement according to its terms.



### 1. *The FAA Inquiry: Did the Parties Agree To Arbitrate the Dispute at Issue and Is the Arbitration Agreement Revocable?*

"[T]he question of arbitrability—whether the [arbitration agreement] creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination." *AT&T Techns., Inc.* v. *Communications Workers of Am.*, 475 U.S. 643, 649 (1986). Because arbitration is "a matter of contract between the parties," *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995), a court asked to compel arbitration of a dispute must first "determine whether the parties agreed to arbitrate that dispute." *Mitsubishi*, 473 U.S., at 626; *see EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("Because the FAA is 'at bottom a policy guaranteeing the enforcement of private contractual arrangements,' we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement.") (internal citation omitted). The parties' intentions control that determination, "but those intentions are generously construed as to issues of arbitrability." *Mitsubishi*, 473 U.S., at 626. "An order to arbitrate the particular [dispute] should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers of Am.* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960).

There is no question that respondents' RICO claims are within the scope of their arbitration agreements. The agreements plainly state that they will arbitrate "any disputes about their business relationship" with United and "[a]ny controversy" or "claim arising out of" their agreements with PacifiCare. J.A.84, 106, 146, 168, 212. The district court specifically held—and respondents have not disputed in this Court—that the parties' arbitration agreements reached the RICO claims. *See In re Managed Care Litig.*, 143

F.Supp.2d, at 1375; *In re Managed Care Litig.*, 132 F.Supp.2d., at 994, 1000 n.3, 1001 n.4.[6]

Nor is there any dispute in this case about §2 revocation issues. Neither of the lower courts found that the arbitration agreements could be revoked on §2 grounds. To the contrary, the lower courts both upheld the arbitration agreements themselves, and the district court ordered respondents to arbitrate various claims under their respective arbitration agreements. Thus, the issue in this particular case is not whether the arbitration agreements could be revoked under §2. Instead, the issue is solely whether the district court could refuse to order arbitration of respondents' RICO claims based on perceived inadequacies in the damage limitation provisions.

### 2. *The Final Inquiry: Did Congress Intend To Preclude Arbitration of the Statutory Claims at Issue?*

Ordinarily the inquiry would conclude with the recognition that the parties irrevocably agreed to arbitrate a dispute within the scope of a valid agreement. *See Waffle House*, 534 U.S., at 294 & n.9. The Court has acknowledged, however, that Congress can, if it desires, preclude the arbitration of certain statutory claims. *Mitsubishi* formally recognized that Congress can make claims under a particular statute nonarbitrable, notwithstanding the FAA. 473 U.S., at 625-28. The Court emphasized, however, that it will not lightly conclude that Congress intended to preclude arbitration, but instead will assume that Congress intends statutory claims to

[6] Another arbitration case currently pending before the Court, *Howsam* v. *Dean Witter Reynolds, Inc.*, No. 01-800 (argued Oct. 9, 2002), also involves a "who decides" issue. But *Howsam* raises serious questions about the scope of the parties' agreement to arbitrate that do not exist in this case. The lower courts in this case determined that respondents clearly agreed to arbitrate their disputes with United and PacifiCare.



be arbitrable unless Congress itself has evinced in the statute's text or legislative history an intention to preclude arbitration, *id.*, at 628, or there is an inherent conflict that puts arbitration at odds with the statute's underlying purposes. *See Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 227 (1987). When statutory claims are at issue, the *final* part of the court's motion-to-compel inquiry is whether Congress has expressly precluded arbitration of the statutory cause of action at issue. *Mitsubishi*, 473 U.S., at 628; *see Green Tree Fin. Corp.—Ala.* v. *Randolph*, 531 U.S. 79, 90 (2000).

The Court's prior decisions in this area have repeatedly focused on whether Congress categorically intended to exempt certain statutory claims from arbitration. *See Mitsubishi*, 473 U.S., at 627 ("[I]t is the congressional intention expressed in some other statute on which the courts must rely to identify any *category of claims* as to which agreements to arbitrate will be held unenforceable.") (emphasis added); *id.*, at 628 ("if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history"). Consistent with that view, the Court has determined that parties may effectively vindicate in arbitration causes of action created by the Securities Act, the Securities Exchange Act, RICO,[7] the Sherman Act, and the Age Discrimination in Employment Act of 1967. *See Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 483 (1989); *McMahon*, 482 U.S., at 242; *Mitsubishi*, 473 U.S., at 637, 640; *Gilmer*, 500 U.S., at 25, 28.

[7] *McMahon* addressed the arbitrability of RICO claims and held that they are arbitrable. *See* 482 U.S., at 238 ("There is nothing in the text of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act."); *id.* ("There is no hint in [the] legislative debates that Congress intended for RICO treble-damages claims to be excluded from the ambit of the Arbitration Act.").

Respondents' "effective vindication" or "meaningful relief" argument does not relate to the categorical arbitrability of RICO claims, but instead is an attempt to inappropriately extend the Court's categorical, statute-level review to specific arbitral procedures or remedies agreed to by the parties. In the face of the FAA's statutory text and the policy concerns requiring limited review at the motion-to-compel stage, respondents want the courts to independently review, before arbitration, the agreed-upon terms of the arbitration agreement to ensure that the parties have not limited the respondents' ability to obtain all statutorily authorized remedies. None of the Court's cases, however, permit a court to consider free-ranging "effective vindication" claims separate from the categorical review of statutory rights or traditional §2 revocation analysis.[8] "At this interlocutory

[8] In *Green Tree*, the Court refused to allow a plaintiff to avoid arbitration of her Truth in Lending Act (TILA) claims even though she argued that her "arbitration agreement's silence with respect to costs and fees creates a 'risk' that she will be required to bear prohibitive arbitration costs if she pursues her [TILA] claims in an arbitral forum." 531 U.S., at 90. The Court suggested that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in an arbitral forum," *id.*, but then held that the plaintiff had failed to carry *her* burden of proving "that arbitration would be prohibitively expensive." *Id.*, at 92. The cost-of-arbitration issue in *Green Tree* had nothing to do with what procedures should be utilized, or what statutory remedies should be afforded, in arbitration. Rather, the Court in *Green Tree*, citing 9 U.S.C. §2, *id.*, at 89, focused on whether a party can avoid arbitration if she can prove that she will be cut off from access to any dispute-resolution forum altogether due to the high costs of arbitration. *See id.*, at 92 (a party has the burden to make a showing of "prohibitive expense" to avoid arbitration); *id.*, at 93 (Ginsburg, J., concurring and dissenting) (the question of "is the arbitral forum *adequate* to adjudicate the claims at issue" is distinct from the question of "is that forum *accessible* to the party resisting arbitration") (emphasis in original). *Cf. The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972) (stating that a party can invalidate a choice-of-forum clause if "the contractual forum will be so gravely difficult and inconvenient that [the party] will for all practical purposes be deprived of his day in court"). The Court's resolution of the issue was consistent with its traditional §2 revocation analysis and its categorical review of statutory rights.



stage it is not established what law the arbitrators will apply to [respondents'] claims or that [respondents] will receive diminished protection as a result." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *accord id.*, at 542 (O'Connor, J., concurring in the judgment).

Respondents cannot reasonably assert that the terms of their arbitration agreements completely foreclose their statutory remedies for the alleged RICO violations. But, in any event, and for the reasons that follow, permitting prearbitration court review of consensual partial restrictions on statutory remedies would dramatically alter the Court's established motion-to-compel analysis and seriously weaken the Court's long-standing support for arbitration under the FAA.

### B. Congress Intended Arbitrators To Address Questions Regarding the Availability of Remedies in the First Instance.

Once a court has determined that the parties have contractually agreed to arbitrate the statutory claims and that Congress has not barred arbitration of those claims, no further inquiry is required or permitted under §2 or §4 of the FAA, and the court should compel arbitration. In this case, respondents do not dispute that their RICO claims are generally arbitrable; rather they assert only that the damage limitation provisions to which they agreed are improper. Those allegedly invalid damage limitation provisions, respondents argue and the courts below held, render their agreements to arbitrate unenforceable as to their RICO claims. To get to that result, respondents had to ask the

district court to: (1) bypass the general arbitrability issue; (2) interpret the damage limitation provisions and declare them improper as a matter of law; (3) speculatively conclude that the arbitrator would not properly apply the law to the provisions (which is inherent in the district court's declaration that respondents could not obtain "meaningful relief"); (4) reject all of petitioners' defenses of the damage limitation provisions; and (5) then finally rule that the invalidity of the damage limitation provisions somehow invalidated the entire arbitration agreement as to the RICO claims independent of any known §2 grounds.

In essence, the district court interpreted and made substantive determinations, not about the scope of what the parties agreed to arbitrate, but about the merits of the matters that the parties indisputably agreed to arbitrate. But that kind of extensive review is precisely what is not supposed to occur at the motion-to-compel stage, not only because it contradicts the text and legislative history of §2 and §4 of the FAA, but also because it ignores the parties' contractual agreement to arbitrate the dispute, usurps the role of the arbitrator, demonstrates a distrust of the arbitral process that the FAA was intended to dispel, and improperly preempts the court's postarbitration review under §10 (grounds for judicial vacatur of an arbitral award) and §11 (grounds for judicial modification or correction of the arbitral award) of the FAA.

Parties ordinarily do not catalog specific causes of action that they want to address through alternative dispute resolution at the time they execute an arbitration agreement; they instead broadly agree, for instance, to arbitrate "any disputes about their business relationship," J.A.168, 212, and contractually agree on the general rules of the arbitration and any remedial limitations that they mutually accept. When parties agree to remedial limitations in an arbitration agreement, they have agreed not only to the limitation itself,



but also to have the limitation applied or interpreted by the arbitrator. *See First Options*, 514 U.S., at 945. "They have 'bargained for' the 'arbitrator's construction' of their agreement." *Eastern Associated Coal Corp.* v. *United Mine Workers of Am.*, 531 U.S. 57, 62 (2000) (quoting *United Steelworkers of Am.* v. *Enter. Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)); *see Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 509-10 (2001).

In respondents' view, however, when an arbitration agreement limits available remedies, the party asserting a statutory cause of action is entitled to litigate, before arbitration, whether that specific limitation allows "meaningful relief" in arbitration. And, because a plaintiff simply may choose to assert a statutory cause of action, a plaintiff who seeks to avoid arbitration easily may delay or frustrate the arbitration agreement merely by challenging a remedial limitation on the ground that it violates the plaintiff's right to a full statutory remedy. A plaintiff might challenge any number of remedial agreements between the parties, including, for example, an arbitration agreement capping the payment of attorneys' fees, an agreement for liquidated damages, or an agreement otherwise limiting compensatory or punitive damages.

Regardless of the outcome, the mere process of being forced to litigate the meaning and effect of the remedial provisions of the arbitration agreement will effectively deny the nonobjecting party's contractual right to arbitration. *See Southland Corp.*, 465 U.S., at 7 (stating that "prolonged litigation" is "one of the very risks the parties, by contracting for arbitration, sought to eliminate"); *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 558 (1964) (stating that delay in ordering arbitration "may entirely eliminate the prospect of a speedy arbitrated settlement of the dispute, to the disadvantage of the parties"). That process, if endorsed, would eviscerate a party's right to enforce an arbitration

agreement that is otherwise valid under §2 of the FAA and would directly conflict with the Court's directive that "the Arbitration Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.'" *McMahon*, 482 U.S., at 226 (internal citations omitted); *see also Moses H. Cone Mem'l Hosp.*, 460 U.S., at 22-23 & n.27; *Prima Paint*, 388 U.S., at 404.

These kinds of disputes should be and are best resolved by the arbitrator in the first instance. The parties contractually committed to allow an arbitrator to resolve the merits of their disputes and award any appropriate remedy that is authorized under the applicable law and in accordance with the arbitration agreement. The arbitrator should resolve challenges to remedial limitations because, in addition to the fact that the parties agreed to it, only the arbitrator can determine on a complete record what, if any, remedies would be appropriate. Inquiring into the potential availability of a particular remedy before the arbitrator has made any determination that the claimant might be entitled to that remedy is purely conjectural and cannot properly justify blocking arbitration of the claim altogether.[9] Instead, once the court determines that the parties have agreed to arbitrate the claim, the court should defer to the arbitrator's role in initially interpreting the terms of the arbitration agreement and applying the controlling law in light of the entire arbitration record.

[9] Indeed, the review undertaken by the district court in this case was far more speculative than the weakness alleged in the arbitration agreement in *Green Tree*. *See* 531 U.S., at 91. The damage limitation provisions used as the basis for excusing respondents from arbitration would have become relevant only if: (1) petitioners did not waive their reliance on the provisions; (2) the arbitrator ruled in respondents' favor; (3) the parties did not settle the dispute; and (4) the arbitrator declined to treble the damages.



The Court for this reason has previously declined to speculate on whether or how provisions in the parties' arbitration agreement would somehow affect the plaintiff's ability to prosecute or recover on her claim in arbitration and has left those questions to the arbitrator in the first instance. In *Mitsubishi*, for example, the Court expressly declined to consider at the motion-to-compel stage a claim that the arbitral panel could potentially apply the wrong law and, accordingly, affect the plaintiff's prosecution of its antitrust claims. 473 U.S., at 637 n.19. The Court recognized that the potential choice-of-law questions were outside the confines of the limited test for arbitrability and, therefore, were for the arbitrator to address in the first instance with the possibility for review by the court at the award-enforcement stage:

> "We therefore have no occasion to speculate on [the law to be applied by the arbitral panel] at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award . . . [T]he national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Id.*, at 637 n.19, 638.

Building on *Mitsubishi*, the Court in *Vimar Seguros* continued to distinguish between the narrow review permitted before arbitration and the broader postarbitration review in order to define those issues that should be left to the arbitrator in the first instance. Questions regarding what law will apply are to be "decided in the first instance by the arbitrator." 515 U.S., at 541. The Court specifically declined to speculate at the motion-to-compel stage about "what law the arbitrators will apply to petitioner's claims," or about whether "petitioner will receive diminished protection" as a result of the choice-of-law decision. *Id.*, at 540. Those issues were "premature" because "[r]espondents seek only to enforce the arbitration agreement" and the lower court would have the

"'opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed.'" *Id.* (quoting *Mitsubishi*, 473 U.S., at 638).

By limiting its consideration at the motion-to-compel stage to issues related to the making and scope of the arbitration agreement, and by refraining from considerations of whether and to what extent provisions in an agreement may affect the parties' rights and remedies in arbitration, a court does more than just pay lip service to the "emphatic federal policy in favor of arbitral dispute resolution"; rather, it advances that policy and, in turn, satisfies the goals of the FAA. *See Mitsubishi*, 473 U.S., at 631. By contrast, when a court undertakes to evaluate the validity or effect of a provision of the parties' substantive agreement, the court usurps the role of the arbitrator and deprives the parties of the contractual bargain that the FAA was intended to protect. *See W.R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 764-65 (1983) (parties to an arbitration agreement have bargained to have the arbitrator interpret the contract); *Enter. Wheel & Car Corp.*, 363 U.S., at 599 (same). Even if the arbitrator is free to reinterpret the contractual provisions as part of a subsequent arbitration, the parties will have already litigated in court issues central to the dispute and will have lost forever the efficiency and cost-effectiveness that were part of the arbitration bargain. *See Mitsubishi*, 473 U.S., at 633 ("[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes.").

In addition to improperly substituting the court's judgment for that of the arbitrator, the district court's prearbitration merits review of the parties' damage limitation provisions expresses, at minimum, a "general suspicion of . . . the competence of arbitral tribunals." *McMahon*, 482 U.S., at 231. That suspicion is dramatically revealed in the district



court's conclusion that the unavailability of punitive damages would preclude respondents from effective vindication of their substantive RICO rights in arbitration. That conclusion improperly presumed, first, that the district court was better suited than the arbitrator to interpret the scope of the parties' agreement to limit punitive damages and, second, that the arbitrator would be unable or unwilling to correctly interpret and apply the law to the parties' agreement. It was neither factually credible nor legally permissible for the district court to prognosticate that the arbitrator would not follow controlling law, particularly since all of the arbitration agreements in this case expressly instruct the arbitrator to follow the law. J.A.84, 106-07, 146-47, 168, 212. This Court has repeatedly declined to presume that arbitrators will be incompetent or unwilling to decide the issues placed before them. *See Gilmer*, 500 U.S., at 30; *Mitsubishi*, 473 U.S., at 634. "[W]e have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *McMahon*, 482 U.S., at 232; *see also Gilmer*, 500 U.S., at 32 n.4 (same).

That distrust of the arbitral process improperly led the district court to perform a prearbitration substantive analysis that is both premature and more intrusive than the postarbitration judicial review contemplated by §§10 and 11 of the FAA. Issues of how provisions in an arbitration agreement may affect the parties' rights and remedies in arbitration are outside the scope of a court's motion-to-compel inquiry; they are appropriate for judicial review only at the award-enforcement stage after the arbitrator has addressed them in the first instance.[10] *See Mitsubishi*, 473

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[10] The Court has previously suggested that, on postarbitration review, it would have little hesitation condemning as against public policy agreements whose provisions operate to foreclose completely a party's

U.S., at 637 n.19; *see also John Wiley & Sons*, 376 U.S., at 557.[11] When parties agree to resolve disputes in an arbitral forum, the parties' bargain is not merely to forgo a judicial forum in favor of an arbitral one in the first instance, but necessarily also to conform the scope of judicial review of the arbitral award to the standards provided for in the FAA. *See* 9 U.S.C. §§10-11; *First Options*, 514 U.S., at 942; *cf. Gilmer*, 500 U.S., at 31 ("[B]y agreeing to arbitrate, a party 'trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'") (quoting *Mitsubishi*, 473 U.S., at 628). In the face of a valid agreement to arbitrate, that review should occur only *after* the parties have gone through the arbitration for which they have bargained. *See, e.g.*, *McMahon*, 482 U.S., at 242 (plaintiffs,

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ability to pursue statutory remedies (as opposed to when remedies may still be available but could simply be affected by the terms of the agreement). *See Mitsubishi*, 473 U.S., at 637 n.19; *Vimar Seguros*, 515 U.S., at 540. That dictum is consistent with a court's authority to refuse to enforce foreign judgments that offend "the public policy of the United States." 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §482(2)(d); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2)(b), 21 U.S.T. 2517.

[11] In *John Wiley & Sons*, effectively anticipating the *Mitsubishi* test for arbitrability, the Court acknowledged the limitations on its authority under the Labor Management Relations Act at the motion-to-compel stage:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. Even under a contrary rule, a court could deny arbitration only if it could confidently be said not only that a claim is strictly 'procedural,' and therefore within the purview of the court, but also that it should operate to bar arbitration altogether, and not merely limit or qualify an arbitral award." 376 U.S., at 557-58.



"having made the bargain to arbitrate" their RICO claims, would "be held to their bargain").[12]

*Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995), confirms that there is no need for a district court to conduct prearbitration review of available remedies. On postarbitration review, the Court examined a lower court decision vacating in part an arbitration award that included punitive damages. The Court substantively reviewed the respondents' claims that the arbitration panel had no authority to award punitive damages because the underlying contract was governed by New York law, which did not permit arbitrators to award punitive damages, and ultimately decided that the award "should have been enforced as within the scope of the contract." *Id.*, at 64. Because the Court's review occurred at the *postarbitration* stage, the Court had the benefit of knowing not only the arbitrators' views on the matter, but also that the issue was ripe because the arbitrators had in fact awarded punitive damages. *See id.*, at 54-55. The key to *Mastrobuono*, and what harmonizes it with *Mitsubishi* and other prearbitration cases, is that the Court was conducting the postarbitration inquiry contemplated by §10, rather than the limited arbitrability review authorized by §§2 and 4.

The Court has emphasized that postarbitration judicial review under §§10-11 is sufficient to ensure that arbitral decisions effectively vindicate rights available under statutes, such as RICO, that create arbitrable claims.[13] *See Gilmer*,

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[12] The district court's pre-evaluation of what would have happened during an arbitration is particularly troubling because the respondents in this case have disclaimed to petitioners, the district court, and the court of appeals any intention of arbitrating any claim that is sent to arbitration. R.1244.1; R.1272.4-5; R.1637.1-2; Appellees' Response to Motion for Stay of Proceedings, at 17-18 (5/21/2001).

[13] Respondents incorrectly argued that the second part of the court's motion-to-compel inquiry is more general: to determine "whether [*any*]

500 U.S., at 32 n.4; *McMahon*, 482 U.S., at 232 (noting that judicial review in accordance with the FAA is "sufficient to ensure that the arbitrators comply with the requirements of the statute"). Adequate postarbitration review would be available in this case. If the arbitrator concludes that the arbitration agreements preclude an award of RICO treble damages, then the district court could properly address during award-enforcement proceedings whether that result violates a cognizable public policy—with the benefit of the arbitrator's determination on the merits of respondents' RICO claims.[14] Courts have been willing to invalidate an award when the arbitrator has plainly failed to vindicate a party's statutory rights.[15] But the district court in this case formulated its own

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legal constraints external to the parties' agreement [to arbitrate] foreclosed the arbitration of those claims," and argued that this language justified the court's review of the damage limitation provisions. Brief in Opposition to Petition for Writ of Certiorari, at 7. That reading improperly attempts to expand the *Mitsubishi* test by substituting any external "constraint" for the sole focus of the Court's review: whether there was evidence that "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S., at 628; *see Green Tree*, 531 U.S., at 90; *Gilmer*, 500 U.S., at 26; *McMahon*, 482 U.S., at 227.

[14] The courts of appeals have articulated several grounds—including the violation of public policy and the manifest disregard of the law—that would permit a district court to subsequently vacate an arbitration award. *See Wonderland Greyhound Park, Inc.* v. *Autotote Sys., Inc.*, 274 F.3d 34, 35-36 (CA1 2002); *Sheldon* v. *Vermonty*, 269 F.3d 1202, 1206 (CA10 2001); *DBM Tech., Inc.* v. *Local 227, United Food & Commercial Workers Int'l Union*, 257 F.3d 651, 659-60 (CA6 2001); *LaPrade* v. *Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (CADC 2001); *Greenberg* v. *Bear, Stearns & Co.*, 220 F.3d 22, 27 (CA2 2000); *Williams* v. *Cigna Fin. Advisors Inc.*, 197 F.3d 752, 757-61 (CA5 1999); *Scott* v. *Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (CA11 1998).

[15] *See, e.g.*, *Halligan* v. *Piper Jaffray, Inc.*, 148 F.3d 197, 204 (CA2 1998) (vacating an arbitral award when arbitrators showed manifest disregard for the law in denying a claim for damages under the Age Discrimination in Employment Act); *Montes* v. *Shearson Lehman Bros.*,



interpretation of the damage limitation provisions and then proceeded to hold that the provisions, as interpreted, violated public policy, all before any arbitration made the issues ripe for judicial review.[16]

Allowing a court to usurp the arbitrator's role in performing the merits review also creates an unacceptable risk of gamesmanship and strategically motivated objections. Before arbitration, §4 authorizes judicial intervention only when a party allegedly "fail[s], neglect[s], or refus[es]" to arbitrate. In the absence of a failure or refusal to arbitrate, the dispute proceeds directly to the arbitral forum and judicial review occurs, if at all, only after the arbitration is completed. Parties who willingly comply with a valid arbitration agreement get exactly what they bargained for—contractual interpretation and dispute resolution by the arbitrator. *See W.R. Grace*, 461 U.S., at 764-65. Allowing a party to obtain substantive judicial review simply by interposing an objection to arbitration turns the congressional policy favoring enforcement of arbitration agreements on its head by providing parties to valid arbitration agreements with a

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*Inc.*, 128 F.3d 1456, 1464 (CA11 1997) (reversing district court's affirmance of arbitration award on the basis that it manifestly disregarded the law of Fair Labor Standards Act).

[16] Even if the district court were permitted to reach the issue whether a waiver of RICO treble damages violated public policy, and even if the court were correct that a waiver does violate public policy, that determination should not have absolved respondents of their obligation to arbitrate their RICO claims. If the arbitrator were to enter an award for a RICO violation without having trebled the amount of compensatory damages, on postarbitration review the district court, if required, could easily vacate the award or modify it to comply with RICO by performing a simple mathematical computation. *See, e.g., Nat'l Post Office Mailhandlers, Watchmen, Messengers and Group Leaders Div., Laborers Int'l Union of N. Am., AFL-CIO* v. *United States Postal Serv.*, 751 F.2d 834, 844-45 (CA6 1985) (directing district court on remand to enter judgment modifying arbitration award to include back pay).

perverse incentive to breach their agreements to arbitrate. The party who decides, in hindsight, that it prefers litigation to arbitration gets precisely what it contractually agreed to waive, and the other party to the arbitration agreement is denied the benefit of its bargain. Parties should be held to their predispute bargain to arbitrate even when, after a dispute arises, they may regret their agreement to submit to an arbitral forum. *See First Options*, 514 U.S., at 942; *McMahon*, 482 U.S., at 242; *Prima Paint*, 388 U.S., at 404.

A number of circuits have addressed whether the validity of a limitation on remedies in an arbitration clause should be addressed by the district court or the arbitrator in the first instance and have concluded, in line with the Court's precedent, that the decision should be made by the arbitrator in the first instance. *See Boomer* v. *AT&T Corp.*, 309 F.3d 404, 419 n.6 (CA7 2002); *Thompson* v. *Irwin Home Equity Corp.*, 300 F.3d 88, 91-92 (CA1 2002); *Metro E. Ctr. for Conditioning & Health* v. *Qwest Communications Int'l, Inc.*, 294 F.3d 924, 929 (CA7 2002); *Arkcom Digital Corp.* v. *Xerox Corp.*, 289 F.3d 536, 539 (CA8 2002); *Larry's United Super, Inc.* v. *Werries*, 253 F.3d 1083, 1086 (CA8 2001); *MCI Telecommunications Corp.* v. *Matrix Communications Corp.*, 135 F.3d 27, 33 n.12 (CA1 1998); *Great W. Mortgage Corp.* v. *Peacock*, 110 F.3d 222, 228, 232 (CA3 1997); *but see Inv. Partners, LLP* v. *Glamour Shots Lic., Inc.*, 298 F.3d 314, 316 (CA5 2002); *In re Humana Managed Care Litig.*, 285 F.3d, at 973-74 & n.3; *Graham Oil Co.* v. *ARCO Prods. Co.*, 43 F.3d 1244, 1247-49 (CA9 1995).

The district court could not justifiably rely on the Eleventh Circuit's *Paladino* decision because the court in that case impermissibly decided issues that should have been left to the arbitrator in the first instance, *i.e.*, when it held that it could deny arbitration if the relief available in arbitration was not "sufficiently meaningful." *See Paladino* v. *Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (CA11 1998). The district



court's evaluation in this case whether respondents could obtain "meaningful relief" in their prospective arbitrations similarly ran afoul of the limitations of §2, usurped the role of the arbitrator, deprived the parties of the benefit of their bargain, exhibited improper distrust for the arbitral process, and failed to recognize the adequacy of postarbitration review. Rather than attempting to determine whether the arbitration agreement provided "meaningful relief" at the motion-to-compel stage—an analysis that should have been foreclosed by *Mitsubishi*, *McMahon*, *John Wiley & Sons*, and *Gilmer*—the district court should have simply sought to determine whether the arbitration agreement itself was revocable under §2 and then compelled arbitration of the RICO claims.[17]

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[17] The district court also refused to compel arbitration of Dr. Kelly's ERISA claims, unjust enrichment claims, and claims for violation of state prompt pay laws because of a provision in his arbitration agreement that required arbitration to be commenced within one year after either party notifies the other in writing of a dispute. *See In re Managed Care Litig.*, 132 F.Supp.2d, at 1001. The district court improperly construed this diligent-prosecution requirement as an impermissible "one year statute of limitations" on Dr. Kelly's claims that excused him from arbitrating his ERISA and other statutory claims, *see id.*, although the court also inconsistently stated that it was "not persuaded that the statute of limitations provision is a strong enough factor, on its own, to overcome the FAA's strong presumption in favor of arbitration," and ordered arbitration of Kelly's contractual claims. *Id.* Apparently recognizing this impropriety, the district court later issued an order to Dr. Kelly to show cause why the district court should not reverse its position and compel Dr. Kelly to arbitrate his state prompt pay claims. R.1199.3-5. Assuming, *arguendo*, that Dr. Kelly's arbitration agreement did contain an impermissible one-year statute of limitations provision on claims brought in arbitration, the district court should have compelled Dr. Kelly to arbitrate his ERISA, unjust enrichment, and state prompt pay claims for the very same reasons that it should have ordered arbitration of the RICO claims. Once the district court determined that Dr. Kelly entered into an agreement to arbitrate ERISA, unjust enrichment, and state prompt pay claims, and further determined that the ERISA statute did not preclude a

## II. THE DAMAGE LIMITATION PROVISIONS COULD NOT JUSTIFY EXCUSING RESPONDENTS FROM ARBITRATING THEIR RICO CLAIMS.

Even if the district court could have properly reviewed the validity of the restriction on punitive damages found in the physicians' respective arbitration agreements, the court still erred in its interpretation and application of the provisions. In ruling that respondents' RICO claims were exempt from arbitration, the district court first interpreted the provisions limiting punitive damages strictly to prohibit treble damages under RICO, held that the provisions would not allow for meaningful relief in the arbitration, and then declared that the entire arbitration agreement would not be enforced in connection with the physicians' RICO claims. *See In re Managed Care Litig.*, 143 F.Supp.2d, at 1375; *In re Managed Care Litig.*, 132 F.Supp.2d, at 1000-01. With or without the damage limitation provisions, respondents can enforce their RICO rights in arbitration, and the RICO claims should have been sent to arbitration.

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waiver of judicial rights, then the district court should have compelled these claims to arbitration, leaving to the arbitrator to decide in the first instance whether Dr. Kelly's arbitration agreement contained an impermissible one-year statute of limitations. Subsequent to the district court's refusal to compel arbitration of Dr. Kelly's unjust enrichment claim, respondents attempted to waive this claim, and requested the court of appeals to stay the unjust enrichment claim. *See* Appellees' Consolidated Reply Brief, at 34 n.9 (6/4/2001). The court of appeals did not stay the unjust enrichment claim and it improperly refused to compel Dr. Kelly to arbitrate his unjust enrichment claim. *See In re Humana Managed Care Litig.*, 285 F.3d, at 973-74.



### A. A Limitation on Punitive Damages Does Not Prevent an Award of RICO Treble Damages.

The lower courts refused to compel arbitration of respondents' RICO claims because they incorrectly construed the language in the arbitration agreements restricting the arbitrator's ability to award "punitive" damages as encompassing RICO treble damages. But the district court's determination that RICO treble damages are "a form of punitive damages," *id.*, at 1001, does not accurately reflect the purposes of RICO treble damages and should not have served as a basis for disregarding both the damage limitation and the agreement to arbitrate itself (at least as to the RICO claims). Statutory treble damages are not themselves punitive damages in the ordinary sense of the term, and RICO legislative history and the substantial differences between statutory treble damages and traditional punitive damages confirm that RICO treble damages should not be considered "punitive damages" within the context of the arbitration agreements. Even if there were some uncertainty about how the term should be interpreted, that uncertainty should have been resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24-25 (obligating district courts to resolve "any doubts concerning the scope of arbitral issues . . . in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability"); *see also Volt*, 489 U.S., at 476 (same).[18]

The term "punitive damages" that appears in the arbitration agreements is a familiar term that generally describes a category of common-law damages independently awarded to

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[18] That is particularly true in light of United's concession below that—because United does not believe that RICO treble damages are punitive damages—it would not assert the damage limitation provisions to bar an award of RICO treble damages in arbitration. R.582.14-16.

punish a defendant for its conduct. *See Molzof* v. *United States*, 502 U.S. 301, 306 (1992) ("'Punitive damages' is a legal term of art that has a widely accepted common-law meaning."). Treble damages, on the other hand, are a statutorily created category of damages that serve disparate purposes and whose nature and practice differ significantly from common-law punitive damages. *See Inv. Partners,* 298 F.3d, at 317. RICO treble damages are not within the common-law meaning of the term of art "punitive damages." *See Molzof*, 502 U.S., at 306.

Moreover, multiple damages provisions in federal statutes are also distinguishable from punitive damages because they are not enacted primarily for punitive purposes. *See* BLACK'S LAW DICTIONARY, definition of "MULTIPLE DAMAGES" (7th ed. 1999) (citing DAN B. DOBBS, LAW OF REMEDIES §3.12, at 359 (2d ed. 1993)) ("[M]ultiple damages statutes may be enacted for entirely non-punitive purposes."). That is true of RICO treble damages. *See Liquid Air Corp.* v. *Rogers*, 834 F.2d 1297, 1310 n.8 (CA7 1987) ("Although there is some sense in which RICO treble damages are punitive, they are largely compensatory in the special sense that they ensure that wrongs will be redressed in light of the recognized difficulties of itemizing damages."); *accord Aetna Cas. Sur. Co.* v. *P&B Autobody*, 43 F.3d 1546, 1572 (CA1 1994) ("It may reasonably be argued . . . that RICO damages are primarily compensatory in nature."); *see also Carter* v. *Berger*, 777 F.2d 1173, 1175-76 (CA7 1985).

Indeed, it is clear from the legislative history of RICO's treble damages provision—on which the Court relied in *McMahon*—that it was enacted for "non-punitive purposes" and should not have been defined as punitive damages in interpreting the arbitration agreements. In *McMahon*, the Court observed that the legislative history of §1964(c) reveals an "emphasis on the remedial role of the treble damages provision." 482 U.S., at 241. "This focus on the remedial



function of §1964(c)," the Court added, "is reinforced by the recurrent references in the legislative debates to §4 of the Clayton Act as the model for the RICO treble-damages provision." *Id.*, at 241 (citing 116 CONG. REC. 35,346); *see also* S. REP. NO. 91-617, at 81-82 (1969) (stating that RICO was not intended "to visit punishment on any individual" or to be "penal"); Judith A. Morse, Note, *Treble Damages Under RICO: Characterization and Computation*, 61 NOTRE DAME L. REV. 526, 547 (1986) ("Congress intended treble damages not as a means for punishing the defendant, but as a remedy for the plaintiff."). The legislative history was cited in *McMahon*, along with an analogy to the antitrust laws, in support of what the Court called "the priority of the compensatory function of [the treble damages provision] over its deterrent function." *McMahon*, 482 U.S., at 240.

Without strong evidence that Congress actually enacted RICO treble damages primarily as a form of punitive damages, it was improper for the district court simply to assume that it was so for the purpose of holding that the provision could not properly be applied to respondents' RICO claims, especially when that conclusion then formed the basis for releasing respondents from their obligation to arbitrate their RICO claims altogether. Even if the Court were to determine that RICO treble damages have a punitive component, as the Court has done in some other treble damages contexts,[19] "they are not 'punitive' for purposes of interpreting the scope of an arbitration clause." *Inv. Partners*, 298 F.3d, at 318 (holding that "the prohibition in the parties' arbitration agreement against awarding 'punitive damages' does not extend to statutory treble damages").

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[19] *See, e.g.*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 785-86 (2000) (stating that the treble damages and civil penalties authorized by the False Claims Act are "essentially punitive in nature").

Although the district court in this case recognized the Court's rulings requiring that arbitration agreements be construed generously in favor of arbitration, *see In re Managed Care Litig.*, 132 F.Supp.2d., at 993 (*citing Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24; *Mitsubishi*, 473 U.S., at 625-26), it nevertheless interpreted the term "punitive damages" in the arbitration agreements unnecessarily broadly in order to bar arbitration. Given this Court's recognition of Congress's strong expression that RICO treble damages are not primarily punitive and the inherent differences between RICO's statutory treble damages and punitive damages, at the very least there are serious doubts regarding whether RICO treble damages should be considered "punitive damages" within the scope of the arbitration agreements. Those doubts should have required the lower courts to interpret the damage limitation provisions in the arbitration agreements so as to preserve the parties' agreement to arbitrate their disputes. *See Warrior & Gulf Nav. Co.*, 363 U.S., at 582-83 (stating that a dispute should be arbitrated "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute").

### B. The Limitation on "Extracontractual Damages" in Dr. Porth's Arbitration Agreement Does Not Impermissibly Limit RICO Treble Damages.

The district court refused to compel arbitration of Dr. Porth's RICO claims after concluding that he could not recover RICO treble damages in arbitration because his arbitration agreement prohibits the arbitrator from awarding "extracontractual damages, including punitive or exemplary damages." *See In re Managed Care Litig.*, 132 F.Supp.2d, at 1000. The court erred, however, in reading the "extracontractual damages" limitation as a general bar on any damages other than for breach of contract, rather than a



specific limitation on breach-of-contract damages. The limitation on "extracontractual damages" serves merely as a limit on the arbitrator's ability to award non-economic damages, such as punitive damages, and would not, for the reasons stated above, bar an award of RICO treble damages. *See* DAN B. DOBBS, LAW OF REMEDIES §12.1(1), at 753 (2d. ed. 1993) ("Punitive damages and mental anguish damages are thus considered 'extracontractual,' and usually denied in pure contract cases."); *Barnes* v. *Gorman*, 122 S.Ct. 2097, 2102 (2002) ("punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract").[20]

The limitation on extracontractual damages does not prevent Dr. Porth from asserting claims against United in arbitration; it merely represents the parties' mutual agreement to limit any damages to expectancy-type damages under their contractual relationship. Again, the parties were entitled to arrange their contractual affairs as they saw fit, and the courts should not, in the absence of express congressional intent, bar the application of an express waiver of statutory rights.

### C. The Damage Limitation Provisions Are an Enforceable Part of the Parties' Contractual Agreements.

Even if the Court determines that the damage limitation provisions in the arbitration agreements must be interpreted

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[20] The lower courts concluded that this "prohibition on extracontractual damages is precisely the type of arbitration agreement that was found unenforceable in *Paladino*." *In re Managed Care Litig.*, 132 F.Supp.2d, at 1000. In fact, the *Paladino* arbitration clause was dramatically different because it authorized the arbitrator "to award damages for breach of contract only," *see Paladino*, 134 F.3d, at 1056, and thus was interpreted to restrict the party to a single cause of action. Dr. Porth's arbitration agreement, by contrast, merely limits him to expectancy-type damages and bars punitive damages, but does not limit the kinds of claims Dr. Porth could assert against United.

as a bar to RICO treble damages, that limitation was valid and enforceable and could not justify releasing respondents from their obligation to arbitrate their disputes with petitioners. As sophisticated actors,[21] respondents were free to contract and structure their arbitration agreements according to their business needs, including a mutual waiver of punitive damages. Physicians may find themselves facing the possibility of an award of punitive damages when they are accused of submitting fraudulent claims, and it was eminently reasonable for both parties to bilaterally agree to waive the right to assert punitive damages in arbitration. Prior to *Mastrobuono*, several circuits permitted parties to contractually waive punitive damages and have subsequently relied on *Mastrobuono* to support that conclusion. *See, e.g., Inv. Partners*, 298 F.3d, at 318 n.1 (finding that "[p]rovisions in arbitration agreements that prohibit punitive damages are generally enforceable") (citing *Mastrobuono*, 514 U.S., at 56-57); *Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 939-40 (CA10 2001); *Long* v. *Silver*, 248 F.3d 309, 319 (CA4 2001); *MCI Telecommunications Corp.* v. *Matrix Communications Corp.*, 135 F.3d 27, 33 n.12 (CA1 1998); *Baravati* v. *Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709-10 (CA7 1994); *Raytheon Co.* v. *Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (CA1 1989); *Surman* v. *Merrill, Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 63 (CA8 1984).[22]

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[21] The district court expressly found as a factual matter that the parties to this dispute are sophisticated actors. *See In re Managed Care Litig.*, 132 F.Supp.2d, at 998.

[22] A few state courts have at least arguably indicated a contrary view. As of the date of filing of this brief, at least one petition is pending before the Court seeking to resolve a claimed conflict between the near-uniform view of the federal courts that waivers of punitive damages are enforceable and the contrary view of a state court. *See Friedman's Inc.* v. *West Virginia ex rel. Dunlap*, No. 02-315, 71 U.S.L.W. 3163 (filed Aug. 27, 2002).



The Court has repeatedly emphasized the presumption that parties may voluntarily waive constitutional[23] and statutory[24] rights and remedies by agreement.[25] *See New York* v. *Hill*, 528 U.S. 110, 114 (2000) ("We have . . . in the context of a broad array of constitutional and statutory provisions, articulated a general rule that presumes the availability of waiver . . . .") (internal quotation marks omitted); *United States* v. *Mezzanatto*, 513 U.S. 196, 200-01 (1995) (stating that "[r]ather than deeming waiver presumptively unavailable absent some sort of express enabling clause, we instead have adhered to the opposite presumption") (citing *Shutte* v. *Thompson*, 82 U.S. 151, 159 (1872) (providing that "a party may waive any provision, either of a contract or of a statute, intended for his benefit")). Without an affirmative indication

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[23] In *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995), the Court stated that "[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution." *See, e.g., Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-49 (1973) (holding that a person may consent to an unreasonable search and seizure); *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969) (permitting waiver of right to jury trial, right of confrontation, and privilege against self-incrimination); *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938) (holding that a person may waive right to counsel).

[24] *See, e.g., NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) (providing that "a union may even bargain away [the employee's] right to strike during the contract term, and his right to refuse to cross a lawful picket line"); *United States* v. *Khattak*, 273 F.3d 557, 561 (CA3 2001) (validating a waiver of appeal under 18 U.S.C. §3742 (1994), and stating that "[t]he ability to waive statutory rights . . . logically flows from the ability to waive constitutional rights").

[25] Due process rights to notice and hearing prior to civil judgment are also subject to waiver. *See D.H. Overmeyer Co.* v. *Frick Co.*, 405 U.S. 174, 185 (1972) (quoting *Nat'l Equip. Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315-16 (1964)) ("[I]t is settled . . . that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether.") (alteration in original).

of congressional intent to the contrary, "statutory provisions are subject to waiver by voluntary agreement of the parties." *Mezzanatto*, 513 U.S., at 201.

These principles apply with equal force to arbitration agreements, given Congress's and the Court's emphasis on giving full effect to the parties' intent. *See Volt*, 489 U.S., at 479 ("Arbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."); *Davis* v. *Prudential Sec., Inc.*, 59 F.3d 1186, 1193 (CA11 1995) ("[A]n agreement to arbitrate is equivalent to voluntarily entering into a contract, the terms of which the parties are free to specify.") (citing *Baravati,* 28 F.3d, at 709) ("[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."). And, "[h]aving made the bargain to arbitrate, . . . part[ies] should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 473 U.S., at 628.

When congressional intent to preclude waiver is not made abundantly clear, the Court has allowed parties to waive statutory rights and remedies. In *Evans* v. *Jeff D.*, 475 U.S. 717, 719-20 (1986), the respondents contested the waiver of a statutory eligibility for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 contained in a settlement agreement. The Court found no support in the Act's text or legislative history to preclude waiver, but did explain its findings:

> "[N]owhere [does the legislative history] suggest that Congress intended to forbid all waivers of attorney's fees . . . . Congress . . . neither bestowed fee awards upon attorneys nor rendered them nonwaivable or nonnegotiable; instead, it added them to the arsenal of remedies available." *Id.*, at 731-32 (citing S. REP. NO. 94-1011, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5912).



The Court has invalidated waivers of statutory rights and remedies only in narrow circumstances when Congress has clearly demonstrated an intent, most often in the statute's text or legislative history, to forbid waivers. *See, e.g., Oubre* v. *Entergy Operations, Inc.*, 522 U.S. 422, 426-28 (1998) (invalidating waiver of Age Discrimination in Employment Act claims when signed waiver failed to conform with the specific requirements of the Older Workers Benefit Protection Act). In the RICO context, however, no congressional policy demands invalidation of a waiver of treble damages agreed to by sophisticated parties. Congress has not expressed any intent to prevent waiver of RICO treble damages, and respondents were not coerced or subjected to any improper disadvantage. To the contrary, nothing in either the text or the legislative history of RICO, including its treble damages provision, provides any basis to suggest that individuals cannot agree to waive its remedies.

If anything, the legislative history of the RICO treble damages provision in particular supports the conclusion that waiver would *not* thwart any articulated legislative policy. The treble damages provision was added late in the legislative process without extensive deliberation, and the version of the bill that passed the Senate, S. 30, was limited to injunctive remedies and did not contain the treble damages provision. *See Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 487 (1985); 116 CONG. REC. 972 (1970). The Senate had rejected earlier versions of the bill that did contain the treble damages provision in identical form. *See Sedima*, 473 U.S., at 487 (citing S. 1623, 91st Cong., 1st Sess., §4(a) (1969); S. 2048, S. 2049, 90th Cong., 1st Sess. (1967)). The treble damages provision now contained in §1964(c) was added to S. 30 in the House relatively late in the legislative process on the

recommendation of the American Bar Association. *See Organized Crime Control Act: Hearings on S. 30 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2nd Sess., at 543-44 (1970) (seeking to add "an amendment to include the additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton Act"). Following the passage of S.30 as amended in the House, *see* 116 CONG. REC. 35,363-64 (1970), the Senate adopted the bill that contained the treble damages provision without seeking a conference. *See Sedima*, 473 U.S., at 488 (citing 116 CONG. REC. 36,296 (1970)). In all of these proceedings, there is no mention whatsoever of any effort to preclude the waiver of any remedies under RICO.

Recognizing the absence of any congressional intent to preclude waiver of RICO treble damages, the courts of appeals have uniformly enforced arbitration clauses with forum selection clauses that effectively waived recovery of RICO treble damages by agreeing to resolve their claims in countries without similar RICO laws. *See Roby* v. *Corp. of Lloyd's*, 996 F.2d 1353, 1366 (CA2 1993) ("That RICO provides treble damages and seeks to deter persistent misconduct does not dissuade us from our view that the [plaintiffs'] contract clauses must be enforced."); *Lipcon* v. *Underwriters at Lloyd's, London*, 148 F.3d 1285, 1299 n.20 (CA11 1998); *Richards* v. *Lloyd's of London*, 135 F.3d 1289, 1296 (CA9 1998) (en banc); *Bonny* v. *Soc'y of Lloyd's*, 3 F.3d 156, 159-61 (CA7 1993).

The arbitration agreements addressed in *Roby* and the related cases represented a sweeping waiver of all RICO remedies, yet the courts nevertheless held that private parties could voluntarily waive their right to any RICO remedies. As sophisticated commercial actors, the parties in this case were free to determine what remedies would potentially be available in arbitration. Because the damage limitation



provisions in this case are far less expansive and potentially apply only to RICO treble damages, respondents will still be able to pursue RICO causes of action in arbitration and, if they prevail, recover "the damages [they] sustain[ed] and the cost of the suit, including a reasonable attorney's fee," under §1964(c). If the parties' arbitration agreements must be construed to bar an award of RICO treble damages in arbitration, then it necessarily follows that the parties reasonably and properly agreed that untrebled compensatory damages would be adequate in arbitration.[26]

By invalidating the parties' contractual damage limitation provisions and holding the arbitration agreements unenforceable as to respondents' RICO claims, the lower courts improperly overreached their authority to review arbitration agreements and contradicted not only congressional intent establishing a "liberal federal policy favoring arbitration agreements," *Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24, but also the ability of parties to

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[26] The Court has remarked that, "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" *Gilmer*, 500 U.S., at 26 (quoting *Mitsubishi*, 473 U.S., at 628); *accord Waffle House*, 534 U.S., at 295-96 n.10. A party may agree to limit statutory remedies as part of a valid agreement to arbitrate, and a party who does so still enjoys the statute's substantive protections. The Eleventh Circuit's contrary rule, that "the arbitrability of [statutory] claims rests on the assumption that the arbitration clause permits relief equivalent to court remedies," *Paladino*, 134 F.3d, at 1062, would require a special exception in the arbitration context to the rule that parties may validly contract to relinquish statutory rights. Such an arbitration-specific exception would be wholly anomalous given that "parties are generally free to structure their arbitration agreements as they see fit" under the FAA, *Volt*, 489 U.S., at 479, and the exception would offend the most basic objective of the FAA—"to place '[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs.'" *Southland Corp.*, 465 U.S., at 16 (quoting H.R. REP. NO. 68-96, at 1 (1924)).

contract freely (both to resolve disputes in arbitration and to waive statutory protections). *See Hill*, 528 U.S., at 114; *Volt*, 489 U.S., at 479.[27]

### D. Even if the Damage Limitation Provisions Are Unenforceable, Respondents' RICO Claims Were Still Arbitrable.

Finally, even if the district court could correctly review the damage limitation provisions of the arbitration agreements and correctly ruled that the parties could not agree to waive RICO treble damages in arbitration, the court still should not have excused respondents from arbitrating their RICO claims. By doing so, the district court strongly contradicted the federal policy favoring arbitration established by §2. *See Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24 ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements. . . .").

If the district court believed that the damage limitation provisions could not be applied to respondents' RICO claims, the court could have easily enforced the arbitration agreements without any limitation on respondents' claims for treble damages under RICO. Both Dr. Porth's and Dr. Kelly's arbitration agreements expressly provide that the arbitrator "shall be bound by controlling law." J.A.168, 212. Dr. Book's and Dr. Breen's agreements similarly state that "[t]he arbitrator shall not have the power to commit errors of law or legal reasoning." J.A.84, 146. If RICO is interpreted to categorically prohibit any contractual waiver of treble

[27] Respondents also have alleged in their complaint that petitioners are civilly liable under 18 U.S.C. §2 because they aided and abetted violations of RICO. The question of whether a private party can waive rights under 18 U.S.C. §2 is simple: A private party cannot enforce 18 U.S.C. §2 in a civil proceeding, *see Central Bank of Denver* v. *First Interstate Bank of Denver*, 511 U.S. 164, 190-91 (1994), so nothing in that statute, its legislative history, or its purpose could restrict a private party's waiver of its provisions.



damages claims, then an arbitrator would be bound to apply that law even in the face of the parties' agreement to the contrary. Thus, notwithstanding the parties' damage limitation provisions, the arbitrator would be not only empowered but actually *required* to award treble damages if RICO liability is established. In light of this obligation, there was no justification for undermining the parties' agreement to arbitrate respondents' RICO claims, *or* for assuming that the arbitrator would not properly apply controlling law.

In any event, even if the district court believed that the damage limitation provisions were unenforceable against respondents' RICO claims, the court should have enforced the remainder of the parties' arbitration agreement because the clauses could have been severed from the arbitration agreements without rendering the agreements meaningless. *See, e.g., Gannon* v. *Circuit City Stores, Inc.*, 262 F.3d 677, 682 (CA8 2001) ("[I]f we were to hold entire arbitration agreements unenforceable every time a particular term is held invalid, it would discourage parties from forming contracts under the FAA and severely chill parties from structuring their contracts in the most efficient manner for fear that minor terms eventually could be used to undermine the validity of the entire contract. Such an outcome would represent the antithesis of the 'liberal policy favoring arbitration agreements.'") (quoting *Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24); *Quiller* v. *Barclays American/Credit, Inc.*, 764 F.2d 1400, 1402 (CA11 1985) (provisions of contract held to be contrary to federal regulations severable if contract would not be rendered meaningless); *Vineberg* v. *Brunswick Corp.*, 391 F.2d 184, 186 (CA5 1968) (stating that it is a "well known principle of contract law that an illegal contract provision, or one contrary to public policy, when invalidated, will be severed from the remainder of the contract if it is possible to do so without leaving the remainder of the contract meaningless"). In the arbitration context, courts have severed provisions from arbitration agreements that

otherwise would have rendered the agreement unenforceable. *See, e.g.*, *Herrington* v. *Union Planters Bank, N.A.*, 113 F.Supp.2d 1026, 1033 (S.D. Miss. 2000) (citing *Jones* v. *Fujitsu Network Communications, Inc.*, 81 F.Supp.2d 688, 693 (N.D. Tex. 1999)).

The essential terms of the arbitration agreements demonstrate the desire and intent of the parties to arbitrate all disputes arising out of their "business relationship" or "agreement." J.A.84, 106, 146, 168, 212. The inclusion of the damage limitation provisions clearly was ancillary to the primary intent of the parties to submit all disputes to arbitration and to avail themselves of the significant benefits of the arbitration forum. *See Coddington Enters., Inc.* v. *Werries*, 54 F.Supp.2d 938, 940 (N.D. Mo. 1999) (citing *Zechman* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F.Supp. 1359, 1364 (N.D. Ill. 1990) ("to the extent the court can infer that the essential term of the provision is the agreement to arbitrate, that agreement will be enforced despite the failure of one of the terms of the bargain")).

If the damage limitation provisions could not be validly applied to respondents' RICO treble damages claims, then severance of offending provisions would have been the best, and perhaps the only, way to reconcile the parties' agreement to arbitrate with the strong federal policy favoring enforcement of arbitration agreements. *See Moses H. Cone Mem'l Hosp.*, 460 U.S., at 24-25 ("[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). Respondents have not asserted, and could not assert, that they would not have agreed to an arbitration agreement without a damage limitation provision. *See Gannon*, 262 F.3d, at 682-83 (severing a provision limiting punitive damages from an otherwise enforceable arbitration agreement because the severance did not affect the party's contractual intent to arbitrate and "excluding the provision only allows her the



opportunity to arbitrate her claims under more favorable terms than those to which she agreed"). The parties clearly intended to arbitrate all disputes arising out of their business or contractual relationships, and the district court's refusal to enforce the arbitration agreements at issue seriously undermines the important federal policy underlying the FAA.

## CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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## STATUTORY APPENDIX

9 U.S.C. §2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. §4:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform

the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. §10:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means.

(2) where there was evident partiality or corruption in the arbitrators, or either of them.

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.



(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. §11:

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

18 U.S.C. §1964(c):

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains . . . .

Supreme Court U.S.
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No. 02-215

IN THE

# Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,

*Petitioners*,

*v.*

JEFFREY BOOK, D.O., *et al.*,

*Respondents.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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## QUESTIONS PRESENTED

Whether on a motion to compel arbitration the court has the authority to determine arbitrability of federal claims including the gateway question of whether a prospective litigant effectively may vindicate his federal statutory cause of action in the arbitral forum.

Whether an arbitration agreement which prohibits an award of federal statutory remedies prevents effective vindication of federal rights and is therefore unenforceable as to those federal causes of action.

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## STATEMENT

Respondents Dr. Manual Porth, Dr. Glenn Kelly, Dr. Jeffrey Book and Dr. Dennis Breen are practicing physicians. Their patients include persons who are insured through United and/or PacifiCare health plans. After a physician provides medical services, the physician must submit a standardized claim form to the health plan in order to be paid for the medical services he or she has provided. Respondents along with other physicians initiated this action against several managed care companies including United and PacifiCare because the companies were systematically delaying and denying payments to physicians and manipulating claims data in order to reduce payment to physicians. As alleged in the complaint, these companies possess overwhelming and dominant economic and market power. As a result of their market dominance, they can coerce physicians into accepting contracts on a "take or leave it basis." R.167 ¶ 174.[1]

Dr. Porth's contract with United contains an arbitration provision which requires arbitration to be commenced within one year of written notice of a dispute and which expressly defines the arbitrator's authority:

> The arbitrators may construe or interpret but shall not vary or ignore the terms of this Agreement, shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages, and shall be bound by controlling law.

J.A. 168. Dr. Kelly's contract with United contains the same provisions except that the arbitrators are only prohibited from awarding punitive or exemplary damages. J.A. 212. Neither agreement contains a severability provision. PacifiCare's contracts with Dr. Book and Dr. Breen also contain arbitration

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1. Citations to the underlying record will reference the docket number and the relevant page number(s) or, where appropriate, paragraph number(s).

provisions with a prohibition on the award of punitive or exemplary damages. J.A. 84, 107.

Petitioners moved to compel arbitration of Respondents' claims. The District Court in this multidistrict litigation reviewed numerous arbitration agreements involving multiple managed care companies. Contrary to the statement of Petitioners, the District Court did not nullify the arbitration agreements. The District Court refused to compel arbitration of "RICO conspiracy and aiding and abetting claims that stem from contractual relationships with other managed care companies."[2] The District Court compelled arbitration of most other claims over numerous objections including arguments relating to filing fees and costs and class relief. Based on the United agreement's prohibition on extracontractual damages, the District Court determined that Dr. Porth would not be able to obtain meaningful relief for his RICO claims. The Court also noted "concerns" relating to the imposition of a one-year limitations period in regard to Dr. Porth's and Dr. Kelly's agreement. In regard to United's agreement with Dr. Kelly and PacifiCare's agreements with Dr. Breen and Book, the Court determined that the limitations on punitive and exemplary damages would preclude recovery of treble damages. The Court held the agreements unenforceable as to Respondents' federal RICO claims. The Eleventh Circuit Court of Appeals affirmed "in its entirety the district court's order." *In re Humana Inc. Managed Care Litigation*, 285 F.3d 971, 973 (11th Cir. 2002), *cert. granted*, 123 S. Ct. 409 (2002).

## SUMMARY OF THE ARGUMENT

With the enactment of the Federal Arbitration Act in 1925, Congress endorsed the use of an alternative forum for commercial and maritime contractual disputes. Since that time, substance has in large measure given way to forum. Few transactions are now free from arbitration and those with limited economic power are often left with no other recourse. Court

2. The Court of Appeals affirmed the District Court's opinion in its entirety. No party filed a petition for certiorari regarding this issue.



access, one of the most fundamental American rights, is simply no longer available for many causes of action. Access to arbitral justice, however, is rarely free and is generally governed by far-reaching procedural limitations. Federal rights are subject to arbitration and are likewise susceptible to the constraints and exactions of arbitration but only "so long as the potential litigant may effectively vindicate his federal rights in the arbitral forum."

Petitioners contend that Respondents not only should be denied court access for a determination of their substantive federal rights but also should be denied court access for a determination regarding the arbitrability of their federal rights. Petitioners' contention, however, must give way to the Court's precedent.

Beginning with the *Steelworkers Trilogy* and continuing through the Court's decision in *Howsam*, the Court has steadfastly held that courts, not arbitrators, must determine substantive questions of arbitrability. Beginning with *Mitsubishi* and continuing through *Green Tree* and *Waffle House*, the Court has also consistently indicated that federal causes of action are arbitrable only if the potential litigant's federal rights may effectively be vindicated in the arbitral forum.

A court, considering a motion to compel arbitration of a federal cause of action, therefore, has a duty to determine as an initial matter whether the federal cause of action can be effectively vindicated in the arbitral forum. The authority and the responsibility to discern and reconcile the competing federal interests resides, as it must, in the judiciary. Once the court has been presented with a specific conflict between the federal cause of action and arbitration, the court cannot, as Petitioners suggest, simply defer the determination of arbitrability. Post-arbitration review is essential but is not sufficient to protect federal causes of action.

Access barriers, procedural limitations or substantive denials in arbitration can effectively eviscerate a party's ability to pursue his or her rights. Because Petitioners' arbitration

agreements expressly limit the arbitrator's ability to award appropriate damages for Respondents' RICO claims, the agreements are unenforceable as to those claims.

First, United's agreement with Dr. Porth prohibits the arbitrator from awarding "extracontractual damages". This phrase is simply not susceptible to an interpretation that would allow the award of RICO treble damages. Arbitration of Dr. Porth's RICO claims would, therefore, result in a significant loss of his substantive federal rights.

Second, each of the arbitration agreements precludes the award of "punitive" or "exemplary" damages. Although the Court has determined that antitrust and RICO treble damages serve a remedial purpose, the Court has also consistently characterized such damages as punitive or exemplary. Because RICO treble damages are at least, to some degree, punitive or exemplary, a prohibition on such damages necessarily limits Respondents' ability to fully and effectively vindicate their RICO claims in the arbitral forum.

The District Court properly determined that the Respondents' RICO claims are nonarbitrable and that the arbitration agreement is unenforceable as to the federal cause of action. The District Court had neither the authority nor the duty to restructure the parties' agreement.

The Court should neither accept nor condone a rule of law which entrusts federal statutory and constitutional rights, at least as an initial matter, to nonjudicial discretion. An arbitration agreement which encompasses federal causes of action should result in a change of forum rather than a forfeiture of the "substantive rights afforded by the statute." An employee's agreement to arbitrate as a condition of employment, a consumer's consent to a predispute arbitration provision as a requirement for access to goods and services or even a doctor's concession to arbitration as a prerequisite for treating his own patients should not result in a forfeiture of substantive federal rights. If individual citizens and the public at large are to be



accorded the full measure of rights bestowed by Congress, courts must have the authority to make a gateway determination of arbitrability including an assessment regarding the viability of the federal claim in the arbitral forum. If the court's authority were confined to a determination that an arbitration agreement in fact exists, then the protection of federal rights would extend no further than the reach of each individual citizen's bargaining power.

## ARGUMENT

### I. The Court, Not The Arbitrator, Must Decide Arbitrability Including The Gateway Question Of Whether A Prospective Litigant Effectively May Vindicate His Federal Statutory Cause Of Action In The Arbitral Forum.

Judicial resolution of gateway arbitrability disputes constitutes one the most fundamental precepts of arbitration jurisprudence. *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960). The Court has repeatedly held that "the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 591 *quoting AT&T Technologies Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986) (emphasis in original).

Petitioners concede, as they must, that arbitrability is a question for the court. Petitioners contend, however, that the court's arbitrability determination is limited solely to a determination of whether the parties' arbitration agreement encompasses the statutory cause of action and whether Congress

has clearly and uncategorically proscribed arbitration of the specific federal cause of action. The Court's role, while limited, is not so circumscribed. The Court has maintained the tenuous balance between substantive federal policies and the policies underlying the Federal Arbitration Act by requiring a gateway judicial determination as to whether the terms of the arbitration agreement require forfeiture of substantive rights and deny the litigant the ability to vindicate his statutory cause of action in the arbitrable forum. This analysis, which weighs and reconciles competing federal interests, is reserved, as it must be, to the discretion of courts rather than arbitrators who have a financial interest in determining disputes to be arbitrable and who have no special expertise in federal statutory causes of action. Questions relating to the ability of the litigant to effectively vindicate his or her rights in the arbitral forum are not distinct from the issue of arbitrability as Petitioners contend but are, in fact, determinative of the arbitrability of federal statutory causes of action.

The determination of "who – court or arbitrator – has the primary authority to decide"[3] arbitrability is always critical, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995), but is never more imperative than in the context of federal statutory or constitutional claims. The Court has often struggled to reconcile the tension between the federal policy favoring arbitration and the policies underlying federal statutory causes

3. The question of "who" has the authority to decide the issue of arbitrability is completely distinct from the merits of the decisionmaker's resolution of the arbitrability issue. Petitioners' argument focuses primarily on the question of whether the District Court reached the wrong conclusion regarding the arbitrability of Respondents' RICO claims rather than the authority of the court to reach the issue. If the District Court in this case had agreed with Petitioners that the Respondents had failed to present sufficient evidence that they would be unable to vindicate their federal rights in the arbitral forum, as the Court did in *Green Tree*, the District Court's decision would have nonetheless been an adjudication regarding the arbitrability of the claim.



of action.[4] Courts and commentators have debated the applicability of the Federal Arbitration Act to statutory causes of action and continue to question the uneasy union between arbitration and statutory rights where the need for protection is greatest and the litigant's power to bargain is often little more than myth.[5] Courts initially refused to compel arbitration of

4. Compare *Wilko v. Swan*, 346 U.S. 427, 438 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). ("As the protective provisions of the Securities Act require the exercise of judicial discretion to fairly assure their effectiveness, it seems to us that Congress must have intended § 14 . . . to apply to waiver of judicial trial and review"); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 56-57 (1974) ("Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII . . . The specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land") with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) ("[W]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims.") and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) ("To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with out current strong endorsement of the federal statutes favoring this method of resolving disputes").

5. *See, e.g., Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); Paul L. Edenfield, *No More the Independent and Virtuous Judiciary?: Triaging Antidiscrimination Policy in a Post-Gilmer World*, 54 Stan. L. Rev. 1321 (2002); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right To A Jury Trial*, 16 OHSJDR 669 (2001); Colin P. Johnson, *Has Arbitration Become A Wolf in Sheep's Clothing?: A Comment Exploring The Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights*, 23 Hamline L. Rev. 511 (2000); Eric A. Hernandez, *Mandatory Arbitration and Employment Discrimination: The Unfair Law*, 2 Cardozo Online J. Conflict Resol. 96 (2000); Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of*

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statutory causes of action. *See Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). The Court ultimately rejected an across-the-board determination of nonarbitrability, first in the context of international agreements, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and then in domestic arbitration. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). The Court cautioned, however, that statutory causes of action, which embody unique public policy concerns, are not automatically subject to arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

A federal statutory claim is arbitrable only if a court determines, as an initial matter, that (1) the parties' agreement to arbitrate reaches the statutory issues and (2) "legal constraints external to the parties' agreement" do not foreclose arbitration of the statutory claims. *Mitsubishi*, 473 U.S. at 628. The most significant legal constraint on the arbitration of federal statutory claims is the requirement that the agreement result only in a change of forum rather than a forfeiture of the "substantive rights afforded by the statute." *Id. See also Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 U.S. 279, 295 n.10 (2002); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105,123 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987).

Federal statutory claims are validly arbitrable only "so long as the prospective litigant effectively may vindicate [the]

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*Statutory Claims in Employment?*, 16 Ga. St. U. L. Rev. 293 (1999); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L. J. 1 (1996).



statutory cause of action in the arbitral forum."[6] *Mitsubishi Motors Corp. v. Soler Chyrsler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). *See also Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79, 90 (2000); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 240 (1987). If a potential litigant forfeits substantive rights or cannot otherwise effectively vindicate his statutory claims in the arbitral forum, then an inherent conflict exists between arbitration and the federal act at issue; the arbitration agreement is accordingly unenforceable. *Shearson/American Express, Inc.*, 482 U.S. at 242.

The Court clearly applied this analysis in *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79 (2000), where the Court addressed the petitioner's substantive argument that the parties' arbitration agreement was unenforceable because the fee splitting provision in the agreement precluded effective vindication of her federal TILA claims:

> In determining whether statutory claims may be arbitrated we first ask whether the parties agreed to submit their claims to arbitration, and then ask whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. . . . In this case, it is undisputed that the parties agreed to arbitrate all claims relating to their contract, including claims involving statutory rights. Nor does Randoph contend that the TILA envinces an intention to preclude a waiver of judicial remedies. She contends instead that the arbitration agreement's silence with

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6. In his dissent in *Wilko v. Swan*, 346 U.S. 427, 439 (1953), *overruled by Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), Justice Frankfurter noted, "There is nothing in the record before us, nor in the facts of which we can take judicial notice, to indicate that the arbitral system . . . would not afford the plaintiff the rights to which he is entitled."

> respect to costs and fees creates a "risk" that she will be required to bear prohibitive arbitration costs if she pursues her claims in an arbitral forum, and thereby forces her to forgo any claims she may have against petitioners. Therefore, she argues, she is unable to vindicate her statutory rights in arbitration. . . . It may well be that the existence of large arbitration costs could preclude a litigant such as Randolph from effectively vindicating her federal statutory rights in the arbitral forum.

*Green Tree Financial Corp.- Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (citations omitted). *See Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 316 (5th Cir. 2002).

Numerous Circuit Courts have adhered to the Court's mandate to consider inherent conflicts between federal rights and arbitral forum before compelling arbitration of federal causes of action. *See Brooks v. Travelers Ins. Co.*, 297 F.3d 167 (2d Cir. 2002) (numerous limitations including restrictions on the length of the hearing, damages, and attorneys' fees and costs); *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314 (5th Cir. 2002) (restriction on punitive damages in RICO action); *Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002) (considering arbitrator's fees but deferring questions regarding statute of limitations to arbitrator); *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280 (11th Cir. 2001), *rehearing and rehearing en banc denied*, 273 F.3d 1118, *vacated per stipulation*, 294 F.3d 1275 (11th Cir. 2002) (expenses of arbitration, attorneys' fees and costs); *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549 (4th Cir. 2001) (fees and costs associated with arbitration; *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306 (6th Cir. 2000), *cert. denied*, 531 U.S. 1072 (2001) (acknowledging concerns relating to biased and incompetent arbitrators and fee structure but finding agreement unenforceable on other grounds); *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230



(10th Cir. 1999) (arbitration fees and costs); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998) (limitation on remedies); *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995) (restriction on exemplary damages, attorneys' fees and reduced statute of limitations). *But see Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88 (1st Cir. 2002) (attorneys' fees); *Metro East Center for Conditioning and Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924 (7th Cir. 2002), *cert. denied*, 123 S. Ct. 707 (2002) (holding that issue relating to attorneys' fees was to be decided by FCC but discussing in dicta the appropriateness of determination by arbitrator); *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083 (8th Cir. 2001) (exclusion of punitive damages in RICO action)[7].

Parties would reasonably expect a court to determine, as an initial matter, whether an arbitration provision impermissibly burdens a litigant's statutorily defined rights. Arbitrators often address procedural issues and at times must consider "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met." *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 592 (2002), quoting Revised Uniform Arbitration Act § 6, comment 2, 7 U.L.A., at 13 (Supp. 2002) (emphasis omitted). Arbitrators possess certain undisputed expertise, including a "greater institutional competence . . . in interpreting collective-bargaining agreements." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986). "On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts. . . ." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). Courts have the

7. The following cases, cited by Petitioners, are inapposite because federal claims were not at issue: *Boomer v. AT&T Corp.*, 309 F.3d 404 (7th Cir. 2002); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536 (8th Cir. 2002); *MCI Telecommunications Corp. v. Matrix Communications Corp.*, 135 F.3d 27 (1st Cir. 1998), *cert. denied*, 524 U.S. 953 (1998); *Great Western Mort. Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997), *cert. denied*, 522 U.S. 915 (1997).

ability, the authority and the duty to reconcile competing federal policies. Arbitrators do not function as substitute federal courts and are not charged with reconciling counterbalancing federal policy concerns. Arbitrators have no expertise in the resolution of legal issues. Arbitrators generally determine the rights of the parties in accordance with the terms of the parties' agreement. Judicial resolution is necessary to insure "a fair and expeditious resolution of the underlying controversy." *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 593 (2002).

Moreover, the arbitration proceeding does not establish the same kind of predictability and reliability in interpreting the law that the federal judiciary provides. Federal judges, nominated by the President and confirmed by the Senate, are specially qualified to interpret federal laws. They write opinions that establish precedent to be followed in other similar cases. Arbitrators are not generally required to write or publish opinions. Arbitrators can and do interpret laws in differing ways with no adequate or meaningful review to insure the consistent application of the rule of law with respect to acts of Congress.

The "wait and see" approach advocated by Petitioners is not a tenable alternative to a judicial determination of arbitrability. The initial arbitrability determination and post-arbitration review each serve distinct roles and are not interchangeable. The Court in *Gilmer* and *McMahon* indicated that post-arbitration review is sufficient to overcome generalized concerns regarding the incompatibility of arbitration and statutory claims. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987) ("[T]here is no reason to assume at the outset that the arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute"); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991). However, at no point has the Court indicated that the potential for limited post-arbitration review excuses an initial arbitrability determination where parties seek resolution regarding specific barriers to the



vindication of their statutory rights. In fact, the Court in *Gilmer* analyzed whether any specific impediments – including bias, limited discovery, lack of written decisions – would curtail the litigant's ability to vindicate his ADEA claims. *Gilmer*, 500 U.S. at 30-32. The Court in *Gilmer* also specifically noted that the arbitrator's remedial authority was not restricted. *Id.* at 32.

Petitioners also cite this Court's decisions in *Mitsubishi* and *Vimar Seguros* as support for their contention that the court's role is confined to post-arbitration review. *Mitsubishi* and *Vimar Seguros* involved international arbitration agreements which raise additional federal policy concerns not present in the context of domestic arbitration agreements. *See Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 629 (1985) ("[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need for the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in the domestic context.") *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995) ("If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements"); *Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285, 1294 (11th Cir. 1998) ("Supreme Court precedent thus suggests that the enforceability of choice clauses in international agreements should be determined by a framework designed specifically for the international commercial context").

More importantly, the petitioners in *Mitsubishi* and *Vimar* raised only the possibility that the arbitrator would not properly apply United States law. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539-540 (1995) ("Petitioners' second argument against enforcement of the Japanese arbitration

clause is that there is no guarantee foreign arbitrators will apply COGSA. . . . At this interlocutory stage it is not established what law the arbitrators will apply to petitioner's claim or that petitioner will receive diminished protection as a result.") *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 636 (1985) ("There is no reason to assume at the outset that international arbitration will not provide an adequate mechanism.") Although the agreement might have potentially been unenforceable as applied by the arbitrator, a conflict with federal law was not apparent from the face of the agreement itself. In this case, the District Court did not indulge in generalized concerns regarding the ability of arbitrators to correctly apply federal law. Instead, the District Court properly considered whether a conflict exists between the express limitations in the agreement and Respondents' federal RICO claims. A judicial determination regarding whether an express limitation would preclude the litigants from vindicating their statutory rights does not usurp the rule of the arbitrator and does not eviscerate the contractual expectations of the parties. The Court's decisions in *Mitsubishi*, *McMahon*, *Gilmer* and *GreenTree* contemplate that a district court will address specific arbitratibility disputes utilizing precisely the type of analysis the District Court undertook in this case. The possibility of circumspect post-arbitration review is not a valid substitute for a judicial determination of arbitrability.

Denying a litigant judicial consideration of the arbitrability of his federal right until after arbitration on the merits would be both prejudicial and inefficient. Parties would be subjected first to arbitration and then to a judicial determination of the arbitrator's decision. One of the primary benefits of arbitration is a speedy, final determination. Post-arbitration review would potentially be more intrusive and less deferential than an initial determination of arbitrability. In addition, arbitrators can only consider arbitration agreements that frustrate federal causes of action on an ad-hoc basis; federal rights should be subject to a uniform rule of law.



A gateway assessment of arbitrability is necessary to insure that a party is not compelled to submit nonarbitrable issues to an arbitral forum. A litigant cannot be compelled to arbitrate a claim prior to a judicial determination of arbitrability. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964). *See also AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986); Thomas H. Oehmke, 2 *Commercial Arbitration* § 47.05 (Cumulative Supp. 2002). Denying pre-arbitration review completely eviscerates the policies underlying the federal cause of action and belies the protection and respect accorded statutory claims in *Mitsubishi*, *McMahon* and *Gilmer*. Given the remedial limitations in the arbitration provision, Respondents cannot vindicate their statutory rights in the arbitral forum. Neither legal precedent nor public policy allow a court to defer the arbitrability determination for post-arbitration review.

Petitioners' argument suggests that arbitrators function as alternate district courts subject to judicial review. Petitioners' view of the interplay between arbitration and judicial oversight is not only overly simplistic but highly distorted. Arbitrators are not judges with expertise in interpreting the law and, in fact, many arbitrators are not even lawyers. Arbitrators are creatures of contract, limited by the terms of the agreement itself. The arbitration provisions in this case provide express limitations on the authority of the arbitrator. The arbitrator cannot vary from the contract terms and cannot freely ignore the limitations on his authority in order to substitute his concept of federal public policy. Should the arbitrator fail to adhere to the express provisions of the agreement, including the agreement's limitation on damages, the FAA accords Petitioners the right to seek an order vacating the award. *See Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1061 (11th Cir. 1998). The arbitrator cannot adjudicate whether the restraint is an impermissible limitation on the party's federal cause of action. Awaiting the arbitrator's application of the remedial limitations

will neither increase nor decrease the permissibility of the limitations.

Petitioners argue that courts do not have the authority to review any aspect of the terms and conditions of arbitration for statutory causes of action unless Congress has clearly indicated that the cause of action is nonarbitrable. Under this view of the law, a district court would have no discretion in compelling arbitration of discrimination claims cognizable under federal law where the agreement expressly includes the claims but where the arbitrator is specifically denied the ability to remedy such discrimination. The limitation on extra-contractual damages in this case is indistinguishable.

Courts, which are empowered to determine the gateway issue of substantive arbitrability, should not abstain from such a determination. "[T]he strong policy favoring arbitration [does not] relieve the court of its duty to make the abitrability determination." Thomas H. Oehmke, 2 *Commercial Arbitration* § 47.05 (Cumulative Supp. 2002). The Court, likewise, should not embrace a general rule of law that relegates a litigant's federal statutory rights to arbitration regardless of the degree to which the arbitration agreement forecloses vindication of the federal cause of action.

## II. An Arbitration Provision Which Excludes Or Severely Limits Substantive Federal Statutory Rights Or Remedies Is Unenforceable.

In determining whether a federal cause of action is arbitrable, the court must determine whether the litigant will be denied the ability to vindicate federal rights in the arbitral forum. A right can be denied "in express terms" but can also be "denied in substance and effect". *Ward v. Board of County Com'rs of Love County, Oklahoma*, 253 U.S. 17, 22 (1920). Procedural and substantive limitations in arbitration severely restrict and can easily extinguish a litigant's cause of action. Federal rights, which protect public interests and which level the playing field



between those with disparate bargaining power, should not be dependent on the benevolence of those with dominant economic control.

Procedural inequities should not be used to defeat "the assertion of Federal rights, when plainly and reasonably made." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). Arbitration agreements often contain procedural limitations such as the one-year limitation period in Dr. Porth's and Dr. Kelly's agreement with United. J.A. 168-169. In addition to time limitations, potential litigants, with little or no bargaining power and no option other than acquiescing to mandatory pre-dispute arbitration agreements, can be subjected to payment of arbitration fees and costs[8], unilateral or restricted ability to choose the neutral[9], meager discovery[10], lack of compulsory process[11], differing burdens of proof[12], evidentiary distinctions[13], limited judicial review of arbitral awards[14] and other procedural requirements and barriers to access which severely affect substantive outcomes. In addition, employers, corporations and industries, which often require an agreement to arbitrate as a condition of employment or as a condition for accessing goods

8. *See, e.g., Green Tree Financial Corp.- Alabama v. Randolph*, 531 U.S. 79 (2000)

9. *See, e.g., Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

10. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

11. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974).

12. *See, e.g.*, Andrew C. Glass & Albert S. Lee, *The Validity of Arbitral Awards of Punitive Damages*, 1 HVNLR 193, 199-200 (1996).

13. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974).

14. *See, e.g. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Montes v. Shearson Lehman Bros.*, 128 F.3d 1456 (11th Cir. 1997) (review for manifest disregard for the law but not for legal error).

and services, also frequently contend that arbitration cannot be pursued on a collective or class basis.[15] Such procedural

15. The Court has suggested that "[a]rbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001). Such incentives may well exist for parties to commercial contracts where the parties will individually bear the costs of litigation. Such incentives do not exist for most non-commercial plaintiffs because legal representation is based on contingency fee agreements or statutory fee mechanisms. Permitting those with superior bargaining power the unfettered ability to require an agreement to arbitrate which prohibits the award of statutory attorneys' fees would often mean that those asserting federal statutory causes of action will be unrepresented and, accordingly, unable to effectively vindicate their federal rights. Likewise, class actions are not simply procedural mechanisms. As this Court has recognized, "the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'" *AmChem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997), quoting Kaplan, Prefactory Note 497.

> 'The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's labor).'

*AmChem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997), quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997). Absent the ability to obtain statutory fees and to bring actions collectively, plaintiffs with federal statutory claims and most consumers with relatively small claims do not benefit from the cost-avoidance of arbitration. Instead, their ability to secure representation and to effectively vindicate their rights will be vastly curtailed. Corporations and industries with the power to require employees, consumers, and service providers to enter predispute arbitration agreements understand that "procedural" limitations have great "substantive" benefits. *See* Jean R. Sternlight,

(Cont'd)



limitations and access requirements can deny potential litigants the ability to vindicate federal causes of action in arbitration.

Substantive limitations and exclusions are even more oppressive. Arbitration agreements can expressly deny the recovery of statutory attorneys' fees and costs or, alternatively, can fail to provide the arbitrator with the authority to grant such relief.[16] The arbitration agreements at issue in this case severely restrict the arbitrator's remedial authority. Compelling arbitration where the arbitrator does not have the authority to award statutory remedies, attorneys' fees and costs deprives litigants of substantive rights under numerous federal statutes, including RICO. Arbitration agreements should not result in a forfeiture of the "substantive rights afforded by the statute." *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Court has indicated that it "would have little hesitation in condemning" an agreement which operates "as a prospective waiver of a party's right to pursue statutory remedies. . . . as against public policy." *Mitsubishi*, 473 U.S. at 637 n.19. *See also Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995).

(Cont'd)

*Should an Arbitration Provision Trump the Class Action? No: Permitting Companies to Skirt Class Actions Through Mandatory Arbitration Would Be Dangerous and Unwise*, 8 No. 3 Disp. Resol. Mag. 13 (2002). In addition, litigation which is too complex and too costly to pursue on an individual basis such as this case will not be pursued in arbitration absent class mechanisms. The Court has not yet decided the availability of class-wide relief in arbitration. Class certification in arbitration is essential and is even more imperative if the Court expands the role of arbitrators in order to insure consistent application of the law and to assure effective vindication of statutory rights. *See Bazzle v. Green Tree Financial Corp.*, 569 S.E.2d 349 (S.C. 2002), *cert. granted*, 71 U.S.L.W. 3320 (U.S. 2003).

16. *See, e.g., Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995).

Remedies are an inseparable component of any civil cause of action. Treble damages are the "carrot" Congress chose to assure prosecution of RICO claims. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987). An arbitration agreement which precludes recovery of such damages unavoidably conflicts with Congress's intent in enacting the treble damages provision and, accordingly, is unenforceable. At least three Circuit Courts of Appeal have determined that arbitration agreements which encompass federal statutory causes of action must provide meaningful relief for those claims. *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998); *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997); *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1994), *cert. denied*, 516 U.S. 907 (1995). *See also Lipcon v. Underwriters at Lloyd's, London*, 148 F.3d 1285 (11th Cir. 1998), *cert. denied*, 525 U.S. 2093 (1999) and *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (2d Cir. 1993), *cert. denied*, 510 U.S. 945 (1993) (holding, in the context of international arbitrations, that adequate remedies must be made available).

### A. Dr. Porth Cannot Recover Treble Damages Under United's Arbitration Agreement Which Limits the Arbitrator's Ability to Award Extracontractual Damages.

A plaintiff who prevails under RICO is permitted to recover "threefold the damages he sustains." 18 U.S.C. § 1964(c). Yet, United's agreement with Dr. Porth expressly limits the arbitrator's remedial authority, prohibiting the award of any "extracontractual damages, including punitive or exemplary damages". J.A. 168. Based on the plain meaning of the exclusion, the District Court concluded that the arbitrator would be prohibited from awarding RICO treble damages which are not contract damages. Because Dr. Porth would be unable to vindicate his Federal RICO claims in the arbitral forum, the District Court refused to enforce the agreement. *In re Managed Care Litigation*, 132 F. Supp. 2d 989, 1000 (S.D. Fla. 2000).



The District Court's interpretation of the damages exclusion accords with the plain meaning of the language. "Extra" is "[a] Latin preposition, occurring in many legal phrases, and meaning beyond, except, without, out of, outside" or "additional". *Black's Law Dictionary* 585 (6th ed. 1990). Accordingly, extracontractual damages are any damages beyond or in addition to contractual damages.

Petitioners suggest that the limitation on "extracontractual damages" would preclude only non-economic damages, not treble damages. The phrase is simply not susceptible to such an interpretation. Even the authorities cited by Petitioners support the District Court's interpretation of the plain meaning of the limitation. Petitioners first cite Dan B. Dobbs, *Law of Remedies* § 12.1(1), at 753 (2d ed. 1993) ("Punitive damages and mental anguish damages are thus considered 'extracontractual,' and usually denied in pure contract cases.") The statement that such damages are, in fact, extracontractual, does not limit the phrase "extracontractual" to such damages and does not suggest that other types of damages are not also extracontractual damages. The citation instead suggests that "extracontractual" damages are any damages that would not be allowed in "pure contract cases." Petitioners citation of *Barnes v. Gorman*, 122 S. Ct. 2097, 2102 (2002) also supports this understanding. In *Barnes*, the Court noted that "punitive damages, unlike compensatory damages, and injunction, are generally not available for breach of contract". *Barnes*, 122 S. Ct. at 2102. RICO treble damages, which are not compensation for breach of contract, are "extracontractual damages". An arbitrator, acting pursuant to United's arbitration agreement with Dr. Porth, would not have the authority to award treble damages. The damages limitation prevents Dr. Porth from obtaining meaningful relief for his federal RICO claims in the arbitral forum. Accordingly, the arbitration agreement is unenforceable as to the RICO claim[17].

17. This does not mean that the arbitration agreement is unenforceable as to other claims. Petitioners obtain the benefit of their (Cont'd)

### B. Respondents' Treble Damage Remedy Would Also Be Precluded Under United's and PacifiCare's Arbitration Agreements as Punitive or Exemplary Damages.

Petitioners' arbitration agreements prohibit an award of punitive or exemplary damages. J.A. 168. Damages are either "compensatory or punitive according to whether they are awarded as the measure of actual loss suffered or as punishment for outrageous conduct and to deter future transgressions." *Black's Law Dictionary* 390 (6th ed. 1990). *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991) ("purpose [of punitive damages] is to punish what has occurred and to deter its repetition.") "The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

Throughout the Court's history and even under English common law, treble damages have commonly been characterized as punitive or exemplary. The Court noted this history in considering constitutional limitations on punitive damage awards in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996):

> The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree. Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages.

*BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580-81 (1996). The Court also discussed the characterization of treble

(Cont'd)
bargain to arbitrate except for the federal statutory claims where the Respondents would be required to give up significant remedies available under the federal statute.



damage awards as exemplary or punitive damages in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal Inc.*, 492 U.S. 257 (1989):

> This aspect of our Eighth Amendment jurisprudence might have some force here were punitive damages a strictly modern creation, without solid grounding in pre-Revolutionary days. But the practice of awarding damages in excess of actual compensation for quantifiable injuries was well recognized at the time the Framers produced the Eighth Amendment. Awards of double or treble damages authorized by statute date back to the 13th century, see Statute of Gloucester, 1278, 6 Edw. I, ch. 5, 1 Stat. At Large 66 (treble damages for waste); see also 2 Pollock & Maitland 522, and the doctrine was expressly recognized in cases as early as 1763. Despite this recognition of civil exemplary damages as punitive in nature, the Eighth Amendment did not expressly include it within its scope.

*Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 273-75 (1989). *See also Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 n.13 (2001) (noting that a State could adopt a scheme whereby "it defined punitive damages as a multiple of compensatory damages (e.g. treble damages)").

The Fifth Circuit Court of Appeals in *Investment Partners, L.P., v. Glamour Shots Licensing, Inc.*, 298 F.3d 314 (5th Cir. 2202) rejected the plaintiff's argument that a limitation on punitive damages would prohibit an award of RICO treble damages, because the primary purpose of RICO treble damages is remedial. *Investment Partners*, 298 F.3d at 317. The Fifth Circuit Court of Appeals, however, acknowledged that the Court has "referred to treble damage remedies or awards as 'punitive'". *Id* at 317. The Court of Appeals reasoned that "antitrust treble damages may indeed be 'punitive' simply because they exceed the actual damages that have been inflicted on the victim of

violative conduct, but they are not 'punitive' for purposes of interpreting the scope of an arbitration clause." *Id.* at 318.

The Court has indicated that antitrust treble damages and RICO treble damages both have a remedial purpose. *Mitsubishi Motors Corp. v. Soler-Chrysler Plymouth, Inc.*, 473 U.S. 614, 635, (1985); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 240-41 (1987). However, the Court has also consistently recognized that antitrust treble damages, and by analogy, RICO treble damages[18] are, at least in some measure, punitive. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977) ("treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we have frequently observed"; "[t]reble damages were provided in part for punitive purposes"); *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556, 575-76 (1982) ("antitrust treble damages were designed in apart to punish past violations of the antitrust laws . . . [and] to deter future antitrust violations.") In fact, the Court has quantified the "punitive . . . portion of a treble-damages antitrust recovery" as "two-thirds" of the recovery. *Commissioner of Internal Revenue v. Glenshaw Glass Co.*, 348 U.S. 426, 427 (1955). This accords with the plain language of the antitrust act which permits a plaintiff to recover "threefold damages by him sustained", 15 U.S.C. § 15(a) and with RICO which permits a plaintiff to recover "threefold the damages he sustains." 18 U.S.C. § 1964(c). The Court's characterizations suggest that RICO treble damages are, in fact, a hybrid remedy, with both a remedial and a punitive component. *See Faircloth v. Finesod*, 938 F.2d 513, 518 (4th Cir. 1991) ("civil RICO is a square peg and squeeze it as we may, it will never comfortably fit in the round holes of the remedy/penalty dichtomy"). Because RICO treble damages are, at least in part, punitive or exemplary damages, the agreements' restrictions on

18. RICO's treble damage provision was modeled on § 4 of the Clayton Act. *See Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 150-51 (1987); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241 (1987).



the arbitral award of punitive or exemplary damages curtail Respondents' ability to effectively vindicate their RICO claims in the arbitral forum.

### C. Because the Arbitration Agreements Restrict Respondents' Substantive Rights and Their Ability to Vindicate Their RICO Claims, The Agreements Are Unenforceable.

Once a court determines that an arbitration agreement prevents the litigant from effectively vindicating his federal statutory rights in the arbitral forum, then the statutory cause of action is nonarbitrable and the agreement is unenforceable as to those claims. The District Court in this case did not invalidate the arbitration provisions but instead determined that Respondents' RICO claims were not arbitrable based on the agreement's remedial limitations. *In re Managed Care Litigation*, 132 F. Supp. 2d 989, 1000 (S.D. Fla. 2000), *aff'd*, 285 F.3d 971, *cert. granted*, 123 S. Ct. 409 (2002). This is in accord with the Eleventh Circuit's decisions in *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280 (11th Cir. 2001), *rehearing and rehearing en banc denied*, 273 F.3d 1118, *vacated per stipulation*, 294 F.3d 1275 (2002) and *Paladino v. Avnet Computer Technologies*, 134 F.3d 1054 (11th Cir. 1998). The Court in *Green Tree* likewise considered whether the parties' arbitration agreement was "invalid" and "unenforceable" because the agreement was silent as to costs, thereby creating a risk that Randolph would not be able to effectively vindicate her claims in the arbitral forum. *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79, 82, 89-91 (2000). The Court concluded that "The record reveals only the arbitration agreement's silence on the subject, and that fact alone is plainly insufficient to render it unenforceable. . . . The 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Green Tree*, 531 U.S. at 91. The Federal Arbitration Act authorizes a court to determine whether an arbitration provision is valid and enforceable. Neither the Act nor the

Court's decisions suggest that courts have the authority or the duty to redraft the agreement of the parties in order to correct an illegal provision.

Refusing to compel arbitration as to Respondents' RICO claims rather than striking the damages limitation is especially compelling in this case. Limitations on the remedial power of the arbitrator are an integrated component of the arbitration agreement and, accordingly, cannot be severed. *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1248 (9th Cir. 1995). This is particularly evident in the United agreements which incorporate the prohibitions on extracontractual and punitive or exemplary damages into the same clause which prohibits the arbitrator from varying or ignoring the terms of the agreement. In addition, these agreements do not contain a severability provision.

Severance of the damages limitations would not create a disincentive to drafters to avoid such illegal limitations. In fact, those with the power to compel predispute arbitration agreements would benefit from the inclusion of the most restrictive limitations, knowing that the limitations will involve no risk but will deter potential litigants and will only be stricken following judicial review (which Petitioners contend should only occur after arbitration is complete). *Perez v. Globe Airport Security Services, Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001), *rehearing and rehearing en banc denied*, 273 F.3d 1118, *vacated per stipulation*, 294 F.3d 1275 (2002).



## CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

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IN THE

# Supreme Court of the United States

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PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
*Petitioners*,

v.

JEFFREY BOOK, D.O., *et al.*,
*Respondents*.

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**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## PETITIONERS' REPLY BRIEF

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## ARGUMENT

When parties have entered into a written contractual agreement to arbitrate, a district court can refuse to order arbitration only when: (1) the dispute is not within the scope of the parties' contractual arbitration agreement; (2) the agreement to arbitrate is subject to revocation under §2; or (3) one of the parties has asserted a federal statutory claim and Congress has clearly expressed an intent that the statutory claim not be arbitrated. Respondents have not argued, and cannot argue, that any of those circumstances exist in this case.

Instead, respondents and their amici[1] argue that a damage limitation provision in the parties' agreement will independently excuse parties from arbitration if they can assert a claim under a federal statute whose remedies are (or merely may be) limited by contract. Respondents' theory prohibiting contractual remedial limitations in arbitration would dramatically reshape both the substantive law regarding the validity of agreements to arbitrate under the FAA and the process under which such determinations have traditionally been made by the arbitrator.

Parties in most circumstances may agree prospectively to limit or waive remedies in litigation or arbitration, and the Court has never suggested, much less held, that the mere existence of a contractual agreement to limit remedies will excuse a party from arbitrating federal statutory claims that the party has agreed to arbitrate. Respondents do not even argue that the damage limitation provisions are independently invalid. Even if they were, an invalid remedial limitation

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[1] While physician groups are frequent amicus curiae advocates in this Court, none of those groups has chosen to file an amicus brief supporting respondents, presumably because many of those groups encourage arbitration themselves. *See* Tanya Albert, *Patients in Liability Hot Spots Asked to Arbitrate, Not Litigate*, AMERICAN MEDICAL NEWS, February 10, 2003 (available at http://www.ama-assn.org/scipubs/amnews/pick_03/prl10210.htm).

should not void the parties' contractual agreement to arbitrate, and the Court has never held that a damage limitation provision and agreement to arbitrate mutually infect and invalidate one another when used together. Nor has the Court held that only courts—and not arbitrators—are competent to evaluate the validity or scope of a negotiated damage limitation provision.

Respondents and their amici focus on hypothetical examples in which consumers or employees with inadequate bargaining power are coerced into contracts under which they are required to arbitrate and waive many of their substantive rights. To the extent that such individuals would be entitled to relief from their arbitration agreements, that relief would be based on §2 revocation grounds, not because a remedial limitation excuses arbitration. Those kinds of §2 defenses would not, however, be applicable to the contracts negotiated by respondents, all sophisticated actors with advanced degrees.

Respondents contractually agreed to arbitrate their disputes with United and PacifiCare. Respondents' agreements to arbitrate are not revocable under §2, their RICO claims are within the scope of their agreements to arbitrate, and the Court has expressly held that RICO claims may be arbitrated. The district court should have required respondents to arbitrate all of their RICO claims.

## I. THE MEANING AND EFFECT OF REMEDIAL PROVISIONS IN AN ARBITRATION AGREEMENT ARE OUTSIDE THE SCOPE OF A COURT'S ARBITRABILITY DETERMINATION.

As the Court recently reiterated in *Howsam* v. *Dean Witter Reynolds, Inc.*, __ U.S. __, 123 S.Ct. 588, 592 (2002), a court may decide whether an arbitration agreement is enforceable under §2 and whether a dispute is within the scope of the parties' agreement to arbitrate. *See Mitsubishi Motors Corp.*



v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). When a federal statutory claim is raised, a court may decide whether Congress has expressed an intent in the federal statute creating the claim to exempt the claim from arbitration. *Mitsubishi*, 473 U.S., at 628; *cf. Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 380-86 (1996). Once those questions are answered in favor of arbitration, however, the court's inquiry is at an end and arbitration must be ordered. *See* §4; *Howsam*, 123 S.Ct., at 592; *Mitsubishi*, 473 U.S., at 627-28; *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967). All other issues may be raised in, and resolved by, the arbitral forum. *See Howsam*, 123 S.Ct., at 592.

In this case, the district court found, and it has not been disputed, that: (1) the arbitration agreements were enforceable under §2, s*ee In re Managed Care Litig.*, 132 F.Supp.2d 989, 1000-01, 1005, 1007 (S.D. Fla. 2000); (2) respondents' RICO claims fell within the scope of the arbitration agreements, *see id.*, at 1000 n.3, 1001 n.4, 1005 n.9; and, (3) RICO claims are subject to arbitration, *see id.*, at 993 (citing *McMahon*, 482 U.S., at 220). The district court's inquiry should have ended at that point, and the court should have ordered respondents to arbitrate their RICO claims.

Attempting to dramatically expand the district court's pre-arbitration inquiry, respondents radically misapply out-of-context phrases from a handful of the Court's decisions to erroneously suggest that the Court has authorized an intensive, searching review of remedial limitations in cases involving federal statutory claims. Respondents make the same arguments to restrict arbitration of federal statutory claims that the Court has rejected in holding that statutory

claims are arbitrable.[2] Respondents cling to a theory under which federal statutory claims are presumptively not arbitrable unless the court first makes certain findings, Resp. Br. 8-9, but the Court has consistently emphasized that statutory claims *are* arbitrable unless Congress has clearly indicated otherwise. *See Mitsubishi,* 473 U.S., at 627-28; *McMahon,* 482 U.S., at 226-27; *Gilmer,* 500 U.S., at 26; *Green Tree Fin. Corp.—Ala.* v. *Randolph*, 531 U.S. 79, 89-90 (2000). Thus, there is no "uneasy union between arbitration and statutory rights," Resp. Br. 7, and respondents' claim merely manifests their general hostility to arbitration and their specific refusal to fulfill their contractual duty to arbitrate their RICO claims.

The "legal constraints external to the parties' agreement" envisioned by the Court in *Mitsubishi*, 473 U.S., at 628, were solely those potentially imposed by congressional intent to preclude arbitration of certain statutory claims. That review was authorized by the Court to be a limited evaluation of whether Congress had foreclosed the possibility of arbitration of certain statutory claims, not an open-ended review of any asserted error relating to the arbitration. The Court in *Mitsubishi* acknowledged that Congress can make statutory claims nonarbitrable, but certainly did not intend to permit a plaintiff, simply by alleging a violation of a federal statute, to dramatically alter the prearbitration review performed by a court.

Respondents are equally misguided in assuming that they need not arbitrate federal statutory claims if they can allege procedural or remedial limitations that might restrict their

[2] *Compare* Resp. Br. 12 (complaining that "[a]rbitrators are not generally required to write or publish opinions") *with Gilmer*, 500 U.S., at 31-32 (rejecting that complaint as a rationale for not compelling arbitration of ADEA claims). The AAA rules, which govern arbitration under the contracts at issue in this case, require a written ruling and permit any party to request a written rationale for the award. *See* App., Rule R-44.



ability to "effectively vindicate" their claims in arbitration. Resp. Br. 8-9. The Court has restricted the prearbitration "effective vindication" determination to whether there is a categorical conflict between arbitration under the FAA and the statute authorizing the plaintiff's claim. In so doing, the Court has acknowledged that, while Congress expressly ordered in the FAA that arbitration agreements be enforced, Congress also has the authority through separate legislation to exempt statutory claims from the reach of the FAA (although it has rarely done so).[3] *See Mitsubishi*, 473 U.S., at 627 ("[I]t is the congressional intention *expressed in some other statute* on which the courts must rely to identify any *category of claims* as to which agreements to arbitrate will be held unenforceable.") (emphasis added). Because that determination addresses the statutory reach of the FAA, it makes sense to permit a court to determine whether Congress has exempted a statutory scheme from the reach of the FAA. But, again, permitting courts to delay or interfere with arbitration to address premature and speculative questions about remedial limitations decides nothing about arbitrability and merely denies the parties the benefit of their contractual agreement to arbitrate. *See John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 558 (1964).[4]

[3] In searching for an inherent conflict between the FAA and the statute that forms the basis for the claims, the focus is on whether there is an "irreconcilable conflict" like that required in the Court's implied repeal jurisprudence. *See, e.g., Kremer* v. *Chem. Constr. Corp.*, 456 U.S. 461, 468 (1982).

[4] Respondents in effect seek a wholesale overruling of the restrictions the Court has placed on prearbitration review, advocating a system in which a party to an arbitration agreement would be able to obtain prearbitration judicial review of a wide-ranging list of complaints about arbitration, Resp. Br. 17-19, thus ensuring that the courthouse will be a substantial obstacle in enforcing any contractual agreement to arbitrate.

Consistent with that limited approach, the Court has expressly prohibited judicial consideration of contract-based arbitral procedures or remedies until the award-enforcement stage. For instance, in *Mitsubishi*, the Court rejected the type of prearbitration "effective vindication" analysis employed by the district court. *See* 473 U.S., at 637 n.19 ("We therefore have no occasion to speculate on [the law to be applied by the arbitral panel] at [the motion-to-compel arbitration] stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award."); *see also Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 540 (1995); Pet. Br. 19-20.[5]

Respondents have additionally misconstrued the Court's descriptive statements that a party does not forgo statutory substantive rights by agreeing to arbitrate a statutory claim as a categorical prohibition on waivers or remedial limitations in connection with the arbitration of federal statutory claims. There is no basis in the Court's precedent for this proposition. Those statements from the Court describe the result of a bare agreement to arbitrate, *i.e.*, a change in forum for the resolution of the parties' disputes. *See Mitsubishi*, 473 U.S., at 628; *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 296 n.10 (2002).[6] If the Court had intended those statements as a pro-

[5] As in *Mitsubishi* and *Vimar Seguros*, the damage limitation provisions at issue here *do not expressly prohibit* the award of treble damages and certainly make no reference whatsoever to RICO treble damages. J.A.84, 106-07, 146-147, 168, 212. Rather, as in those cases, the district court was faced with only the speculative possibility that application of the damage limitation provisions could result in a conflict with the RICO statute (if one erroneously assumes that RICO remedies are not waivable). *See* Resp. Br. 13-14.

[6] The Court's statement in *Waffle House* that an employee's agreement to arbitrate did not waive the EEOC's own prerogative to sue, 534 U.S., at 296 n.10, merely reflects that a bare agreement to arbitrate does not waive the employee's own substantive rights and neither purports to nor could waive the EEOC's own right to enforce the statutory scheme. Nothing in *Waffle House* holds or even suggests that a private party cannot agree to limit the remedies available to her.



hibition on remedial limitations, they would logically apply equally to all claims, not just federal statutory claims. Nothing in either the FAA or the Court's decisions gives any indication that the parties' agreement to arbitrate remains valid only as long as the parties retain all of their remedial rights and the opposing party does not subsequently decide to assert a federal statutory claim. There is no justification for using the *potential invalidity* of a remedial limitation to excuse a party from its separate contractual obligation to arbitrate.

Once it has been determined that the statute at issue—in this case, RICO—has not been exempted from arbitration by Congress, there is no justification for differentiating these circumstances from the general review of challenges to remedial limitations, which respondents do not and cannot dispute should be performed by the arbitrator. *See John Wiley*, 376 U.S., at 546-47. If respondents had brought only negligence claims and had alleged that the damage limitation provisions improperly limited punitive damages, for example, nothing in respondents' arguments would shift that challenge to the damage limitation provisions from the arbitrator to the court. *See* Resp. Br. 21-22 n.17 (conceding that their arguments "d[o] not mean that the arbitration agreement is unenforceable as to other claims").

At the core of that implicit concession is the acknowledgment that, in the absence of respondents' allegations of statutory RICO claims, the arbitrator would resolve a challenge to the damage limitation provisions and, consequently, that it is not the kind of "narrow circumstance" discussed in *Howsam* that the parties expect a court to resolve before arbitration. 123 S.Ct., at 592. Once it is understood that Congress intended RICO claims to be arbitrable and that arbitrators would normally resolve challenges to remedial

limitations, only unsupportable lingering distrust of the arbitral process could justify specially authorizing courts to perform a prearbitration review on remedial limitations that are potentially applicable to statutory claims.

Respondents have no basis to suggest that parties entering a contractual agreement to arbitrate would "reasonably expect" a court to determine the merits of a challenge to a remedial limitation. *See* Resp. Br. 11-12. The meaning and effect of specific arbitral procedures and remedies are issues that parties expect an arbitrator to decide in the first instance. *See Howsam*, 123 S.Ct., at 592. Indeed, in *Howsam* the Court held that whether a dispute has been brought to arbitration in a timely manner—a question that must be answered *before* reaching the merits of the dispute—is one that the parties expect arbitrators to decide. *See id.* In this case, the issue involves the remedies an arbitrator can award only *after* resolving the merits of the parties' dispute. The parties clearly intended an arbitrator to resolve that issue, in part because only the arbitrator can determine on a complete record what remedies, if any, would be appropriate.[7] Inquiring into the potential availability of a particular remedy, such as RICO treble damages, before the arbitrator has made any determination that the claimant might be entitled to that remedy is purely conjectural and requires the court to engage in what the Court has already deemed to be inappropriate "speculation" at the prearbitration stage. *See Mitsubishi*, 473 U.S., at 637 n.19; *see also Green Tree*, 531 U.S., at 91; *Vimar Seguros*, 515 U.S., at 541.

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[7] The parties also clarified their intent that the arbitrator make these determinations by adopting, in all four arbitration agreements, the AAA rules, including Rule R-8(a), which provides: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *See* App., Rule R-8(a). The parties thus adopted a set of arbitral rules that expressly provide that the arbitrator will make this decision.



Ultimately, respondents are forced to rely on the unsustainable position that an arbitrator cannot determine a challenge to a remedial limitation because the arbitrator is bound to the parties' contractual agreement no matter what the applicable law holds. Resp. Br. 15. That miserly interpretation of an arbitrator's authority does not accurately reflect the arbitrator's authority and duty to resolve a dispute in accordance with controlling law. *See Mitsubishi*, 473 U.S., at 636-37 ("Where the parties have agreed that the arbitral body is to decide a defined set of claims which includes, as in these cases, those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim."); *see* Pet. Br. 40-41 (explaining that the arbitrator is bound to apply controlling law). Ironically, the oft-quoted sentence from *Mitsubishi* on which respondents erroneously rely to suggest that a party cannot limit remedies in arbitration, Resp. Br. 8 (asserting a "requirement that the agreement result only in a change of forum rather than a forfeiture of the 'substantive rights afforded by the statute'"), is really a reaffirmation that parties generally enjoy the same substantive rights in arbitration as in litigation and, consequently, that the arbitrator has the same duty as a court to apply the same substantive law in interpreting the relevant statutes and determining the validity of any contractual remedial limitations to which the parties may have agreed.

If a remedial limitation is invalid under the governing law, an arbitrator has both the duty and authority to enforce the law correctly, and ensuring that the arbitrator has done so is one of the protections afforded by postarbitration review under §§10 and 11 of the FAA. *See McMahon*, 482 U.S., at 232 ("[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute."). If the arbitrator in this case concludes that respondents are entitled to RICO damages but that RICO treble damages are

not awardable under the terms of the arbitration agreements, the district court could subsequently address whether that result violates a cognizable public policy or amounts to a manifest disregard of the law, which the Court and courts of appeals have recognized as bases for vacating an arbitration award. *See First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 942 (1995); *Mitsubishi*, 473 U.S., at 637 n.19; Pet. Br. 24 n.14. Contrary to respondents' assertion, therefore, the arbitrator can evaluate their claim that the damage limitation provisions are not enforceable under controlling law. There is no reason to doubt the authority or willingness of the arbitrator to follow that law, and the arbitrator's determination, when made, can be adequately scrutinized in postarbitration review.

Outside the general determination of what claims come within the scope of a particular agreement to arbitrate and the evaluation of whether Congress has exempted particular statutory claims from arbitration, a court may not perform a claim-by-claim arbitrability analysis. By definition, those claims are arbitrable claims within the scope of the parties' agreement to arbitrate, and a court can only justifiably block arbitration of those claims if the agreement to arbitrate is itself revocable under §2. *See McMahon*, 482 U.S., at 226 (stating that there would be no §2 relief without a well-founded claim of fraud or excessive economic power that would provide grounds for the revocation of any contract).

Notably, respondents do not, and cannot, contend that the district court's decision that the RICO claims are not arbitrable was the result of a §2 analysis. To the contrary, the district court expressly determined that the arbitration agreements are valid, irrevocable, and enforceable. *See In re Managed Care Litig.*, 132 F.Supp.2d, at 1007 (compelling respondents to arbitrate certain claims against petitioners, including breach of contract and *quantum meruit*).



In any event, §2 does not permit the kind of claim-by-claim review respondents seek. By its text and structure, §2 emphasizes the congressionally mandated validity of agreements to arbitrate but preserves a party's common-law ability to seek revocation of the core agreement to arbitrate. *See Prima Paint*, 388 U.S., at 403-04 & n.12. The claimed improper application of the damage limitation provisions to a federal statutory claim is not an arguable ground for revocation of the parties' core agreement to arbitrate. "[T]he only grounds for revocation that meet the requirements of the Federal Arbitration Act are mutual agreement or a condition that vitiates the agreement *ab initio*, including fraud, mistake, and duress." SAMUEL WILLISTON, WILLISTON ON CONTRACTS §57:52, at 347 (Richard A. Lord 4th ed. 1990) (citing *Halcon Int'l, Inc.* v. *Monsanto Austl. Ltd.*, 446 F.2d 156, 159 (CA7 1971) (discussing §2 and explaining that "'Revocation' and 'cancellation' are closely synonymous; to revoke means 'to annul, repeal, rescind, cancel'") (citations omitted)). A court's evaluation of whether a party's agreement to arbitrate may be revoked as a result of fraud, mistake, or duress focuses on the formation of the contractual agreement to arbitrate and whether the party should be permitted to revoke it. *See County of Middlesex* v. *Gevyn Constr. Corp.*, 450 F.2d 53, 56 (CA1 1971). The §2 analysis does not encompass the application of the parties' agreement to arbitrate specific asserted claims. The claims a party chooses to assert will ordinarily be irrelevant to the revocation analysis because a party's ability to revoke an agreement to arbitrate will not depend on the subsequent events giving rise to the need for arbitration. A court may either revoke an agreement to arbitrate under §2 or not, but a court may not rely on §2 to pick and choose between asserted claims. There is no claim-by-claim revocation under §2.

Respondents' reliance on *Green Tree* is misplaced because the Court in *Green Tree* was addressing a §2 claim attempting to completely invalidate the agreement to arbitrate. The cost

issue before the Court in *Green Tree* did not relate to the evaluation of whether Congress had precluded arbitration of TILA claims, *see* 531 U.S., at 90 ("Nor does Randolph contend that the TILA evinces an intention to preclude a waiver of judicial remedies."), but rather to whether "respondent's agreement to arbitrate [was] unenforceable" under §2. *Id.*, at 89. The fact that the respondent in *Green Tree* chose to characterize her argument as one relating to "effective vindication" of her statutory claim does not change the fact that the Court relied on §2 as the basis for its willingness and ability to examine the meaning and effect of terms in the parties' arbitration agreement at the prearbitration stage. *See id.*, at 89-90. Thus, the Court noted that "prohibitive costs" could result in revocation of an arbitration agreement since such costs would deny access to the arbitral forum, making the arbitration illusory. *See id.*, at 90-91. Likewise, the only non-categorical attack evaluated by the Court in *Gilmer* was the petitioner's §2 challenge regarding unequal bargaining power, which the Court quickly rejected. 500 U.S., at 32-33.[8]

Although §2 has no direct application in this case, it is in fact the key to the primary concerns raised by respondents and their amici. For instance, respondents' complaint about unequal bargaining power, Resp. Br. 7 & n.5, 17, is clearly an issue that can be resolved in the §2 context,[9] as are the

[8] Although *Gilmer* examined whether ADEA claims could be effectively vindicated in arbitration in light of "a host of challenges to the adequacy of arbitration procedures," such as limited discovery, *see Gilmer*, 500 U.S., at 30-32, those challenges were not derived from specific limitations set forth in the parties' arbitration agreement. Instead, they were simply "generalized attacks on arbitration" that the Court had previously rejected. *Id.*, at 30.

[9] These kinds of issues do not apply to respondents, all of whom have advanced medical degrees, and whom the district court expressly found to be sophisticated actors in the negotiation of the agreements at issue in this case. *In re Managed Care Litig.*, 132 F.Supp.2d, at 998.



concerns expressed by respondents and their amici regarding potential unfairness to consumers and employees.

The district court erred in undertaking to determine the meaning and scope of the damage limitation provisions at the prearbitration stage. Once it determined that respondents' RICO claims were within the scope of their agreement to arbitrate and that the arbitration agreement itself was enforceable under §2, the district court should have compelled arbitration of respondents' RICO claims.

## II. RESPONDENTS SHOULD BE REQUIRED TO ARBITRATE THEIR RICO CLAIMS BECAUSE THEY HAVE FAILED TO DEMONSTRATE THAT THE DAMAGE LIMITATION PROVISIONS LIMIT THEIR RICO RIGHTS.

Even if a court were the appropriate tribunal to decide the validity of the damage limitation provisions, respondents should still be required to arbitrate their RICO claims because they have failed to demonstrate that the damage limitation provisions limit their RICO rights at all.[10]

### A. A Limitation on Punitive Damages in an Arbitration Agreement Does Not Preclude an Award of RICO Treble Damages.

The lower courts incorrectly construed the language in the arbitration agreements limiting the arbitrator's ability to award "punitive damages" as a limitation on RICO treble

[10] Respondents argue that Dr. Porth's and Dr. Kelly's arbitration agreements may be unenforceable due to "the one-year limitation period in Dr. Porth's and Dr. Kelly's agreement with United." Resp. Br. 17. United has demonstrated that the diligent-prosecution requirement is *not* an impermissible "one-year statute of limitations." Pet. Br. 27 n.17. In any event, the Court's recent opinion in *Howsam* clarifies that such issues should be decided by the arbitrator and not the court. *See* 123 S.Ct., at 592.

damages. Respondents' argument that RICO treble damages have a punitive component does not remotely suggest that RICO treble damages are within the meaning of the term "punitive damages" as that term-of-art is generally understood. *See Molzof* v. *United States*, 502 U.S. 301, 306 (1992); Pet. Br. 29-32.

The Court has never directly characterized RICO treble damages as "punitive damages." Indeed, the Court has repeatedly emphasized the remedial purpose served by RICO treble damages, *McMahon*, 482 U.S., at 240-41, and Clayton Act treble damages on which RICO damages were modeled, *Mitsubishi*, 473 U.S., at 635-36, although it is also true that the Court has referred to antitrust treble damages as being punitive in nature. Resp. Br. 24. Even if there were some ambiguity about the nature of RICO treble damages, the district court was required to construe the arbitration agreements generously in favor of arbitration so as to preserve the parties' contractual agreement to arbitrate. Pet. Br. 32. Accordingly, unless the Court finds that the limitation on "punitive damages" unambiguously precludes RICO treble damages, the damage limitation provisions should be interpreted to permit the possibility of RICO treble damages, and respondents should be required to arbitrate their RICO claims.

### B. Dr. Porth Can Recover RICO Treble Damages Under His Arbitration Agreement That Limits "Extracontractual Damages."

Dr. Porth's contract bilaterally restricts the recovery of "extracontractual damages, including punitive or exemplary damages." Pet. Br. 32. RICO treble damages are not "extracontractual damages" because that term usually refers to non-economic damages, such as punitive damages or mental anguish damages, which are sometimes sought, but typically denied in pure breach of contract cases. Pet. Br. 33. RICO treble damages, on the other hand, are a statutorily created category of damages that are never available in pure breach of contract cases.[11] Because the contract specifically lists punitive and exemplary damages as examples of extracontractual damages, the term should not be interpreted under *noscitur a sociis* to include significantly different categories of damages, like RICO treble damages. *See Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). At worst, the provision is ambiguous and should be interpreted in favor of arbitration. *See Waffle House*, 534 U.S., at 294 (citing *Volt Info. Scis., Inc.* v. *Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).



## III. THE COURT HAS NOT BARRED PROSPECTIVE WAIVERS OF STATUTORY REMEDIES, AND CONGRESS DID NOT PROHIBIT SUCH WAIVERS IN RICO.

If the Court decides that the district court rather than the arbitrator should analyze the effect of the damage limitation provisions in the parties' contracts *and* that the words of the damage limitation provisions can be construed only to preclude recovery of RICO treble damages, the Court should nevertheless compel arbitration in this case. The Court's precedents and the congressional intent underlying RICO make clear that the parties' agreement to waive a subset of their available remedies under RICO is valid and enforceable.

The lower courts did not find, and respondents have not argued, that the damage limitation provisions are invalid independent of the arbitration agreements. Nevertheless,

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[11] "Contract interpretation is generally a question of law." *Carneiro Da Cunha* v. *Standard Fire Ins. Co./Aetna Flood Ins. Program*, 129 F.3d 581, 584 (CA11 1997). Accordingly, the "two-court" rule, *see* Pub. Cit. Br. 4 n.2, has absolutely no application here because that rule merely precludes the Court from disturbing "concurrent findings of fact"—not questions of law. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

amicus Public Citizen incorrectly suggests that private parties may *never* prospectively exempt themselves from a federal statutory scheme that provides mechanisms to enforce a standard of conduct. *See* Pub. Cit. Br. 6. The authority cited by Public Citizen deals almost exclusively with attempts by parties to completely shield themselves from the substantive protections of certain federal statutes intended to protect consumers and employees, such as Title VII, the FLSA, and the Truth in Lending Act. Pub. Cit. Br. 5-8. The damage limitation provisions in this case, however, do not attempt to exempt United or PacifiCare from the standards of conduct proscribed by Congress in the RICO statute. *See McMahon*, 482 U.S., at 228 (distinguishing waivers of "compliance" from other waivers). To the contrary, the arbitrator will be fully able to determine whether United and PacifiCare violated the standards of conduct mandated by RICO and, if respondents prevail, to award appropriate remedies for any violations found by the arbitrator.

Parties may mutually agree to partially waive remedies provided by federal statutes.[12] Pet. Br. 34. As the Seventh Circuit recently recognized, the Court "has never held that *any* entitlement is outside the domain of contract, unless the statute forbids waiver." *Metro East Ctr. for Conditioning & Health* v. *Qwest Communications Int'l, Inc.*, 294 F.3d 924, 928 (CA7 2002). The Court has repeatedly upheld waivers of constitutional or statutory rights. *See* Pet. Br. 35-40; *see also Buckley* v. *Valeo*, 424 U.S. 1, 57 n.65 (1976) (holding that political candidates may waive some speech rights in exchange for a federal subsidy); *United States Civil Serv. Comm'n* v. *Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) (providing that public employees may waive their

[12] It is difficult to imagine, if petitioners were suing respondents for fraudulently submitted claims, that respondents would be decrying the unfairness of the damage limitation provisions or urging that they invalidated the parties' agreements to arbitrate. *See* note 1, *supra*.



right of political speech in exchange for employment); *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 186-88 (1972) (holding a pre-dispute waiver of the constitutional right to notice and a hearing contained in a cognovit note valid where the parties enjoyed equal bargaining positions and the contract was not one of adhesion). In addition, lower courts have upheld prospective waivers of statutory rights when Congress has not evidenced an intent to prohibit such waivers. *See* Pet. Br. 34, 38; *see also Metro East*, 294 F.3d, at 928-29 (upholding an arbitration clause providing for the allocation of attorney's fees under the American Rule, rather than the Communications Act's fee shifting provision); *Johnson* v. *W. Suburban Bank*, 225 F.3d 366, 369 (CA3 2000) (validating an arbitration clause that waived the class action remedy available under the Truth In Lending Act).

The cases cited by Public Citizen do not support a broad prohibition of prospective waivers of a subset of available statutory remedies. Instead, those cases merely acknowledge that individuals cannot waive statutory rights and remedies when Congress has so mandated to protect vulnerable classes, such as employees or consumers.[13] But neither respondents nor their amici ever presented any evidence that Congress in enacting RICO intended to prohibit either prospective or

[13] Public Citizen also relies heavily on the Court's pronouncement in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), that "an employee's rights under Title VII are not susceptible of prospective waiver." *Id.*, at 51-52; *see* Pub. Cit. Br. 5-6. That statement is dictum, and the Court recognized in *Gilmer* that an employee may execute an arbitration agreement relinquishing the right to litigate employment discrimination claims. *Gilmer*, 500 U.S., at 33-35. Indeed, the Court has questioned whether the statement survived *Gilmer*. *See Wright* v. *Universal Maritime Serv. Corp.*, 525 U.S. 70, 80 (1998). In any event, the private attorney general model on which *Alexander* relied, *see* 415 U.S., at 45, "is simply less plausible" for the typical RICO plaintiff than it is for the typical antitrust plaintiff. *McMahon*, 482 U.S., at 242.

retrospective waivers in order to protect a vulnerable class of citizens with unequal bargaining power. Pet. Br. 37-38.

Public Citizen also mischaracterizes the Court's holdings in *Evans* v. *Jeff D.*, 475 U.S. 717, 730-32 (1986) (providing that plaintiffs may waive attorneys' fees under 42 U.S.C. §1988), and *Town of Newton* v. *Rumery*, 480 U.S. 386, 394 (1987) (allowing waiver of right to file suit under 42 U.S.C. §1983), claiming they allow waivers of substantive statutory rights only if such waivers are either contained in a settlement or are the subject of an existing dispute. Pub. Cit. Br. 4-5. Neither case made any distinction based on when the waiver was effectuated.[14] On the contrary, the Court has already refuted that reading by explaining that under *Evans*, "as far as §1988 is concerned, it is the party's right to *waive, settle, or negotiate* [his or her] eligibility" for a statutory award of attorneys' fees. *Venegas* v. *Mitchell*, 495 U.S. 82, 88 (1990) (emphasis added).

Furthermore, there are no similar public policy concerns when each party is a sophisticated, commercial actor, bargaining for what he or she considers more important. Because Congress did not intend to protect respondents from their own voluntary decisions, the damage limitation provisions contained in the arbitration agreements are therefore valid and enforceable.

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[14] *See, e.g., Metro East*, 294 F.3d, at 929 (discussing *Evans* and *Rumery*, and stating that "[a] pre- versus post-dispute line has been drawn by a few statutes, such as the Fair Labor Standards Act, but §206 of the Communications Act is not among them"). A case cited by Public Citizen, *see* Pub. Cit. Br. 7, recognized this principle. *See Cange* v. *Stotler & Co.*, 826 F.2d 581, 596 (CA7 1987) ("[Neither *Evans* nor *Rumery*] embody a distinction between anticipatory waivers and subsequent ones . . . [but] start from the premise that people may strike bargains as they please . . . . There is a difference between statutes that forbid waivers and those that do not.") (Easterbrook, J., concurring).



## IV. ALTERNATIVELY, THE DAMAGE LIMITATION PROVISIONS SHOULD BE SEVERED TO PRESERVE ARBITRATION OF THE RICO CLAIMS.

Even if the Court holds that the damage limitation provisions are not valid, respondents should still be required to arbitrate their RICO claims. There is no independent basis for revoking the parties' agreement to arbitrate, and there is no reason why a court's invalidation of a damage limitation provision should additionally release a party from its contractual obligation to arbitrate. Respondents argue against severance, yet their entire theory depends on severing the damage limitation provision and the agreement to arbitrate, rather than merely the damage limitation provision.

In contrast to respondents' reliance on *Graham Oil Co.* v. *ARCO Prods. Co.*, 43 F.3d 1244 (CA9 1995), there has been no evidence presented or even alleged that the arbitration agreements in this case constitute an improper scheme to deprive respondents of any statutory rights. In any event, it is a well-known principle of contract law that an illegal contract provision may be severed from the remainder of the contract if it is possible to do so without rendering the remainder of the contract meaningless.[15] *See Gannon* v. *Circuit City Stores, Inc.*, 262 F.3d 677, 680-81 (CA8 2001); Pet. Br. 41. "An illegal portion of an agreement that relates to the remedy is more readily separable." WILLISTON, *supra*, §19.69, at 543 (citing RESTATEMENT (SECOND) OF CONTRACTS §183 and comment a; §184) ("If less than all of an agreement is unenforceable under . . . §178, a court may nevertheless enforce the rest of the agreement . . . if the performance as to which the agreement is unenforceable is not an essential part of the agreed exchange."); *see also* E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §5.8 (2d ed. 1998).

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[15] PacifiCare's agreements contain specific severabililty clauses.

Severance of the damage limitation provisions would not encourage parties to include illegal limitations in arbitration agreements. To the contrary, severance will greatly favor respondents, *Gannon*, 262 F.3d, at 682-83, and, as a result of the delays caused by these seemingly interminable prearbitration proceedings, the parties have now "lost many of the advantages of arbitration." *Id.*, at 682 n.7. Respondents' suggestion that severance of the damage limitation provisions would encourage drafters to include illegal limitations in arbitration agreements is undermined by the forfeiture of the very purpose for which the parties agreed to arbitrate all disputes arising out of their business relationship.

## CONCLUSION

For these r[illegible]sons and those stated in petitioners' opening brief, the judgm[illegible] of the court of appeals should be reversed.

Respectfully submitted,

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February 12, 2003

# APPENDIX

## APPENDIX

Commercial Arbitration Rules of the AAA (excerpted):

R-8. Jurisdiction

a. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

b. The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

c. A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-44. Form of Award

a. Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the manner required by law.

b. The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

Supreme Court, U.S.
FILED
DEC 6 2002

(6)

No. 02-215

In the
# Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., ET AL.,
*Petitioners,*

v.

JEFFREY BOOK, D.O., ET AL.,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether a district court must compel arbitration of a plaintiff's RICO claims under a valid arbitration agreement even if that agreement does not allow an arbitrator to award punitive damages, leaving to the arbitrator in the first instance the decision of what remedies are available to the RICO plaintiff in arbitration.

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## INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] WLF seeks to strengthen the free enterprise system and protect the economic and civil liberties of individuals and businesses.

WLF has devoted substantial resources to promoting civil justice reform and freedom of contract. It has published numerous monographs and other educational materials on issues relating to alternative dispute resolution. *See, e.g.*, Michael J. Connolly & Clifford J. Scharman, *U.S. Supreme Court Gives Employers A Chance To Avoid Costly Litigation*, LEGAL BACKGROUNDER (Jun. 9, 2001); Richard Eckman, Stephen Harvey & Jeffrey Techentin, *Arbitration Clauses Can Safeguard Lenders From Class Actions*, LEGAL OPINION LETTER (Dec. 15, 2000); Paul W. Cane, Jr. & E. Jeffrey Grube, *Employment Dispute Arbitration: An Antidote To Frivolous Litigation*, LEGAL BACKGROUNDER (Nov. 13, 1998); Jay W. Eisenhower, *Delaware's New Summary Procedure For Business Disputes Could Reduce Legal Costs*, LEGAL OPINION LETTER (Sept. 9, 1994). It has also appeared as *amicus curiae* in several cases addressing punitive damages issues. *See, e.g., State Farm Mut. Automobile Ins. Co. v. Campbell*, No. 01-1289; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).

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[1] Both petitioners and respondents have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation or submission of this brief.

WLF believes that the decision below is an ill-conceived departure from settled precedent and the sound policies of the Federal Arbitration Act. If left intact, the decision will impose substantial costs not only on the managed health care industry but on all entities that voluntarily seek to resolve disputes through arbitration. These increased costs will ultimately be borne by patients, consumers, and society as a whole. WLF thus brings a broader perspective to the issues in this case than either of the parties.

WLF submits this brief as *amicus curiae* in support of petitioners. For reasons set forth below, WLF urges the Court to reverse the decision of the Eleventh Circuit.

## STATEMENT OF THE CASE

Respondents are medical doctors who entered into physician agreements with various managed care organizations, including UnitedHealthcare, Inc. and United Health Group Incorporated, and PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc.. *See* Pet. App. A-60-63. The agreements contain two provisions relevant to the issues presented in this case. The first provision requires that the parties submit "any disputes about their business relationship" to "binding arbitration." Pet. App. A-62-63; *see also* Pet. App. A-60-61. The second states that arbitrators shall have no authority to award punitive or exemplary damages. *See id.* at A-60-63; *see also* Pet. App. A-30-31.

On August 14, 2000, respondents sued petitioners and other managed care organizations, claiming among other things that they had violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* ("RICO"). Petitioners moved in the district court to compel arbitration pursuant to the plain terms of the parties' agreements.



The district court found that respondents were "sophisticated" commercial actors, *see* Pet. App. A-25-26, and that the parties' agreements were generally enforceable, *see id.* at A-29. Nevertheless, the district court declined to compel arbitration of respondents' RICO claims. It determined that, because the parties had agreed to waive punitive damages, respondents could not recover RICO's treble damages in arbitration. *See id.* at A-31; *see also id.* at A-41. It then held that, even though respondents had freely agreed to arbitrate all disputes, respondents were not required to arbitrate their RICO claims because they could not obtain "meaningful relief" in arbitration. *See id.* at A-31; *see also id.* at A-41.

The Court of Appeals for the Eleventh Circuit affirmed the district court "for the reasons set forth" in the lower court's opinion. *See* Pet. App. A-4.

## SUMMARY OF ARGUMENT

1. Federal law requires that courts enforce arbitration agreements according to their terms. Here, the parties agreed to arbitrate all disputes about their business relationships. *See* Pet. App. A-62-63. The district court therefore should have compelled arbitration of respondents' RICO claims as required by the parties' agreements.

The district court's refusal to enforce the parties' agreements disregards this Court's settled precedent and promotes precisely the type of litigation that the parties' agreements were designed to avoid. Once the court decided that the dispute was covered by a valid arbitration agreement, it should have compelled arbitration, and left any issues regarding the validity and scope of a waiver of statutory remedies to be decided by the arbitrators in the first instance. The court below thus erred by usurping the role of the arbitrator and, in so doing, allowing respondents to

nullify their arbitration agreements with petitioners. And even if the court was entitled to address the validity of respondents' waiver of statutory remedies, the court erred by holding that RICO did not allow such waiver. The normal rule in our legal system is that parties are free to waive their statutory rights and remedies unless Congress precludes such waiver. Congress did not remotely so preclude in RICO.

2. Reversing the lower court and enforcing the parties' agreements according to their terms also serves broader policy goals. Arbitration agreements between physicians and managed care organizations are a critical tool for controlling the skyrocketing costs of health care. By mutually agreeing to arbitrate disputes and waive punitive damages, the parties sought to ensure that their disputes would be resolved quickly and efficiently, and to avoid destructive high-stakes litigation. These direct economic benefits far outweigh any societal interest in encouraging private attorneys general to pursue treble damages under RICO in the face of an express waiver by sophisticated parties of the right to pursue such damages.

## ARGUMENT

### I. THE COURT SHOULD ENFORCE THE PARTIES' AGREEMENTS ACCORDING TO THEIR TERMS

Federal law provides that arbitration agreements must be enforced like other contracts—according to their terms. *See* 9 U.S.C. § 2; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985). This Court's prior cases make clear that a court asked to compel arbitration has the limited task of determining whether the parties' dispute is within the scope of a valid arbitration agreement. If the parties agreed to arbitrate the dispute, that is the end of the matter, and the court must honor the parties' agreement.



Here, because the parties agreed to arbitrate "any dispute about their business relationship," Pet. App. A-62-63, the district court should have compelled respondents to arbitrate their business-related RICO claims. Instead, the district court disregarded the parties' agreement because it did not believe that the arbitrators could award respondents "meaningful relief." *Id.* at A-31. For reasons explained below, the lower court's decision departs from this Court's precedents and should be reversed.

#### A. Federal Arbitration Law Is Based On Freedom Of Contract

The most fundamental precept of federal arbitration law is freedom of contract. Indeed, the "basic purpose" of the Federal Arbitration Act is "to overcome courts' refusals to enforce agreements to arbitrate," *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 838 (1995), thereby placing those agreements on "the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). The Act creates "at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi*, 473 U.S. at 625. It is therefore well-settled that courts must "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt Info. Sciences, Inc. v. Board of Trs. of Stanford Univ.*, 489 U.S. 468, 478 (1989).

It is equally well-settled that parties "are generally free to structure their arbitration agreements as they see fit." *Id.* at 469 (citations omitted); *see also Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (Posner, J.) ("[P]arties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract."). This Court accordingly has not hesitated to give full effect to "the contractual rights and expectations of the parties." *Volt*, 489 U.S. at 479 (noting that courts must

"rigorously enforce" arbitration agreements according to their terms). When an arbitration agreement is "made in an arms-length negotiation by experienced and sophisticated" parties, it must be honored and enforced. *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984).

Moreover, because federal law requires "rapid and unobstructed enforcement of arbitration agreements," a court's role in determining arbitrability is limited. *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 201 (2000) (internal quotation omitted). When asked to compel arbitration of a particular dispute, the court must determine whether the dispute is within the scope of a valid arbitration agreement. *See Mitsubishi*, 473 U.S. at 626. If the court determines that it is, the court's work is done—it must refer the dispute to arbitration. As this Court has repeatedly emphasized, "[c]ontracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts." *Southland*, 465 U.S. at 7.

This Court has also emphasized that federal policy favors arbitration. In the absence of "fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract,'" *Mitsubishi*, 473 U.S. at 627, all doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). An "order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible [to] an interpretation that covers the asserted dispute." *See AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 650 (1986) (internal quotation omitted).

Consistent with this pro-arbitration policy and with freedom of contract principles, a court may not rewrite the parties' agreement by usurping the role assigned to the



arbitrator. In this vein, a court asked to compel arbitration must not delve into the "potential merits of the [parties'] underlying claims." *AT&T Techs.*, 475 U.S. at 649. Other than determining what disputes are within the scope of arbitration, a court has no authority to interpret the provisions of the parties' substantive agreement. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964) ("'[P]rocedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."). As this Court has noted, "[s]uch a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate." *Southland*, 465 U.S. at 7.

### B. The Parties' Agreement To Arbitrate RICO Claims Should Be Enforced

In this case, application of this Court's settled precedents is uncomplicated. There is no dispute that the arbitration agreements between respondents and petitioners were freely negotiated among sophisticated commercial actors. *See* Pet. App. A-24-29. And no one could suggest that the agreements resulted from the "sort of fraud" that could provide grounds for revocation of any contract. *See Mitsubishi*, 473 U.S. at 627 (citing 9 U.S.C. § 2). Accordingly, because the language of the agreements is sufficiently broad to cover RICO claims, the district court should have enforced the parties' agreement and compelled arbitration.

Respondents avoided this straightforward result by convincing the district court that arbitration would deprive them of "meaningful relief." Pet. App. at A-30-31. Although the district court acknowledged that respondents were asking it to "negate [their] contractual obligations," *id.* at A-22, it nonetheless declined to enforce the parties' agreements. It concluded that, because the parties waived

punitive damages, respondents could not recover RICO treble damages in arbitration. *See id.* at A-30-31. At bottom, the district court's decision rests on its conclusion that, by waiving punitive damages, the parties rendered their agreement unenforceable. *See id.* This extreme position is wrong, for two basic reasons.

*First,* the district court erred at the outset by delving into the validity and scope of the damages limitation in the parties' agreement. As long as there is no doubt that the parties agreed to arbitrate a dispute, "defenses to performance—even those that logically defeat arbitration—belong to the arbitrator." *Metro East Ctr. for Conditioning & Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924, 929 (7th Cir. 2002) (Easterbrook, J.); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967). Once it is determined that the parties agreed to arbitrate a particular dispute, the arbitrator can resolve defenses to enforcement without risk that arbitration is being foisted on non-consenting parties. *See Prima Paint,* 388 U.S. at 403-04. Several courts of appeals have therefore correctly held that, under *Prima Paint*, the arbitrator in the first instance determines whether contractual limitations on remedies are valid. *See Boomer v. AT&T Corp.*, 309 F.3d 404, 419 n.6 (7th Cir. 2002); *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001); *MCI Telecommunications Corp. v. Matrix Communications Corp.*, 135 F.3d 27, 33 n.12 (1st Cir. 1998); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997).

The district court's failure to defer to the arbitrator reflects the type of "judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals," that this Court long ago rejected. *See, e.g., Mitsubishi*, 473 U.S. at 626-27. As this Court has repeatedly noted, there is simply no reason to assume that arbitrators will not follow



the law. *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 232 (1987). The district court therefore erred by not allowing the arbitrator in the first instance to address the validity of the parties' punitive damages limitation as applied to respondents' RICO claims.

*Second,* even assuming that the district court had the power to reach the issue, the court erred by concluding that respondents' waiver of treble damages under RICO was invalid. It is axiomatic that parties may generally agree to waive their statutory rights and remedies. *See, e.g., Shutte v. Thompson*, 82 U.S. (15 Wall.) 151, 159 (1873) ("A party may waive any provision . . . of a statute intended for his benefit."); *see also United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) ("[W]e have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties."). After all, "[o]ne aspect of personal liberty is the entitlement to exchange statutory rights for something valued more highly." *Metro East,* 294 F.3d at 929. Accordingly, having made a "bargain to arbitrate, . . . part[ies] should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi,* 473 U.S. at 628; *see also Mezzanatto*, 513 U.S. at 201; *Metro East*, 294 F.3d at 928 ("As far as we know, the Supreme Court has never held that *any* entitlement is outside the domain of contract, unless the statute forbids waiver.").

It is therefore significant that this Court has already held that nothing in the text or legislative history of RICO suggests that Congress intended to exclude RICO treble damages claims from the ambit of the Federal Arbitration Act. *See McMahon*, 482 U.S. at 242. Needless to say, "no citizen is under any obligation to bring [a RICO] suit." *Mitsubishi*, 473 U.S. at 636. Nor does a private RICO plaintiff need "executive or judicial approval before settling

one." *Id.* Indeed, a private RICO plaintiff is free to settle a RICO suit for less than its full expected value in order to avoid the costs associated with prolonged litigation.

It necessarily follows, therefore, that private parties can by contract agree to limit their recoveries under RICO. Because parties need not bring RICO claims in the first place, need not pursue their full remedies under the statute, and may designate an arbitral forum for such claims, they are logically free to limit the damages available in the arbitral forum. *See id.* That is certainly true of the sophisticated private parties at issue here: it is neither necessary nor appropriate for the courts to rewrite the parties' agreements to give respondents benefits for which they did not bargain.

## II. ENFORCING THE PARTIES' AGREEMENTS ACCORDING TO THEIR TERMS WILL HELP KEEP HEALTH CARE COSTS UNDER CONTROL

While enforcing the parties' agreements according to their terms is required by settled precedent, it is also consistent with important broader policy goals. The Federal Arbitration Act's focus on enforcing private contracts benefits society as a whole. *See, e.g.*, Michael I. Krauss, *Tort Law and Private Ordering*, 35 St. Louis U. L.J. 623, 625-26 (1991). Rigorous enforcement of contracts allows parties to regularize their relations and to reduce future uncertainties by creating rules well-suited to their peculiar circumstances. *See, e.g.*, Richard A. Epstein, *Market And Regulatory Approaches to Medical Malpractice: The Virginia Obstetrical No-Fault Statute*, 74 Va. L. Rev. 1451, 1453-55 (1998) (explaining the logic of contract).

Here, these principles have real-world significance. Arbitration agreements between physicians and managed care organizations are a vital tool for controlling ever-burgeoning costs. *See* American Arbitration Assoc.,



Am. Bar Assoc., Am. Med. Assoc., *Final Report* (July 27, 1998) (recommending that arbitration "can and should be used" to resolve disputes between health care providers and managed care organizations). Because litigation is costly and time-consuming, arbitration (like other forms of alternative dispute resolution) "has increasingly gained acceptance and recognition among healthcare providers and insurers as a quick and inexpensive means of resolving various types of healthcare disputes." Alma Saravia, *Overview of Alternative Dispute Resolution in Healthcare Disputes*, 32 J. Health L. 139, 140 (1999).

Moreover, as commentators have noted, disputes between physicians and managed care organizations are especially well-suited for arbitration. *See id.* at 143; *see also* Roderick B. Mathews, *The Role of ADR In Managed Health Care Disputes*, 54 Disp. Resol. J. 8, 11 (Aug. 1999) ("The advantages of ADR are particularly compelling in the managed health care context.") Most physicians and managed care organizations "have entered into long term relationships, sharing the common goal of providing treatment to patients." Saravia, *Overview of Alternative Dispute Resolution*, 32 J. Health L. at 140. Arbitration is therefore a useful mechanism that permits parties to resolve their disputes while maintaining continued business relationships. *See* Saravia, *Overview of Alternative Dispute Resolution*, 32 J. Health L. at 143; *see also* Ann H. Nevers, *Medical Malpractice Arbitration In The New Millennium: Much Ado About Nothing?*, 1 Pepp. Disp. Resol. L.J. 45, 49-50 (2000) ("Arbitration makes it easier for the parties involved to maintain their relationships while increasing the opportunity for the claimant to be satisfied").

Under these circumstances, it makes sense that physicians and managed care organizations might agree, as they did here, to limit the remedies available in arbitration.

It is generally accepted, for example, that punitive damages are a "powerful weapon" that "have a devastating potential for harm." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42-46 (1991) (O'Connor, J., dissenting). Indeed, scholars have shown that punitive damage awards may well impose substantial costs on society with little (if any) tangible benefits. *See* W. Kip Viscusi, *Why There Is No Defense Of Punitive Damages*, 87 Geo. L.J. 381 (1998); *see also* W. Kip Viscusi, *The Social Costs Of Punitive Damages Against Corporations in Environmental & Safety Torts*, 87 Geo. L.J. 285 (1998).

By forgoing punitive damages in arbitration, physicians and managed care organizations have thus mutually agreed to disarm themselves of the most threatening legal weaponry. Both parties to the contract benefit, as does the general public. Disputes are quickly and efficiently resolved, destructive high-stakes litigation is avoided, and health care costs are kept in check. *See* Nevers, *Medical Malpractice Arbitration*, 1 Pepp. Disp. Resol. L.J. at 50 (noting that in traditional litigation, unlike arbitration, "a large amount of the award lands in the pockets of the plaintiff's attorney").

In this context, the notion that respondents are deprived of "meaningful relief" by arbitrating their RICO claims is fanciful. Nothing in the agreements prevents the respondents from recovering the actual damages they may have suffered. The agreements only prevent either party from recovering a windfall in punitive damages.

Nor is there any broader policy reason for encouraging parties to breach their contracts and litigate RICO claims that they promised they would arbitrate. After all, no one could reasonably suggest that managed care organizations are the "archetypal, intimidating mobster," that RICO actions were designed to fight. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). The direct economic benefits of decreased



health care costs are surely more important to the Nation's well-being than any interest in encouraging private attorneys general to recover treble damages awards that they have expressly disclaimed.

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,
*Petitioners*,

v.

JEFFREY BOOK, D.O., *et al.*,
*Respondents*.

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Eleventh Circuit**

## BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AND AMERICAN ASSOCIATION OF HEALTH PLANS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether a district court must compel arbitration of a plaintiff's RICO claims under a valid arbitration agreement even if that agreement does not allow an arbitrator to award punitive damages, leaving to the arbitrator in the first instance the decision of what remedies are available to the RICO plaintiff in arbitration.

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**BRIEF OF**
**NATIONAL ASSOCIATION OF MANUFACTURERS AND AMERICAN ASSOCIATION OF HEALTH PLANS, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

## INTEREST OF *AMICI CURIAE*[1]

The question presented in this case is whether a district court is required to enforce the terms of an arbitration agreement when the agreement expressly precludes a RICO plaintiff from recovering "extracontractual" or "punitive" damages on his RICO claim. *Amici* have a vital interest in the correct resolution of that question, because *amici*'s members have entered into thousands of arbitration agreements that expressly preclude arbitrators from awarding punitive and extracontractual damages. *Amici*'s members will be adversely affected by a decision rendering such agreements unenforceable, because they will be deprived not only of the benefit of their bargains but of the inexpensive, prompt, and expeditious arbitration mechanism they rely upon to resolve many of their business disputes.

The National Association of Manufacturers ("NAM")—18 million people who make things in America—is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

The American Association of Health Plans, Inc. ("AAHP") is the national association for the managed health care community. AAHP represents more than 1000 managed health care organizations serving nearly 150 million Ameri-

[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

cans. AAHP's mission is to advance health care quality and affordability through leadership in the health care community, advocacy, and the provision of services to member health plans.

## STATEMENT

1. This case arises from a massive nationwide class action filed on behalf of more than 600,000 physicians against ten of the largest managed care organizations ("MCOs") in the United States. The plaintiff physicians—respondents here—provide treatment to individuals who receive health coverage under employee benefit plans insured or administered by the MCOs. Respondents allege that, for more than a decade, the MCOs have failed to pay them adequate reimbursements for the medical services that respondents have provided to the insureds of the relevant employee benefit plans.

In particular, respondents allege that the MCOs—on their own and as part of a conspiracy with every other defendant MCO—have implemented a plan to "deny, delay and diminish" the reimbursement payments due to physicians. *See* Second Am. Compl. at ¶ 5. The complaint alleges that the MCOs have orchestrated this scheme by using commercially available computer software that, though required to be used in processing reimbursements under Medicare, Tricare and other federal programs, allegedly processes physician bills in a way that artificially reduces the amount the physicians are paid; the complaint also alleges that the MCOs delay payment on claims in order to obtain a "float" on the monies due. Respondents allege that, by engaging in that conduct, the MCOs have conspired to violate, violated, and aided-and-abetted violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; and that they have violated state statutes and contractual and quasi-contractual obligations. The RICO claims—which are at issue here—allege that the MCOs are part of an illegal country- and industry-wide "enterprise" that spans virtually every aspect of the health care delivery system in the Nation,



and that the MCOs have engaged in acts of "racketeering"—mail fraud, wire fraud, and extortion—that have harmed the physician class. *See* Second Am. Compl. at ¶¶ 183-98.

For the most part, respondents' right to reimbursement from MCOs arises either from a direct contract entered into by the physician and MCO, or by a contract entered into by the MCO and a provider group, such as an independent physician association or a physician hospital association. The terms of those contracts are heavily negotiated and vary significantly from physician to physician (and from physician group to physician group) over terms as fundamental as the services that will be covered, claim submission provisions, claim payment timeframe requirements, and fee schedules.

Given the tremendous volume of claims for reimbursement that MCOs process every year, many physician groups and MCOs have found it mutually beneficial to include arbitration clauses in their provider contracts. Not every MCO has entered into an arbitration agreement with every physician or physician group, but many MCOs and physician groups are attracted to the arbitration mechanism because it ensures that reimbursement disputes are resolved promptly and efficiently and without the expense of full-blown litigation—attributes that are particularly important in the managed care area, where the cost of litigation can easily exceed the value of disputed reimbursement claims. As with other terms in provider agreements, arbitration clauses vary and are subject to vigorous negotiation.

As part of their agreements to arbitrate, many MCOs and provider groups also may agree to waive any right to recover punitive or extracontractual damages. By limiting recoveries to actual, out-of-pocket losses, MCOs and provider groups can better predict their respective liabilities to one another. The benefits from such waivers are mutual. Overbilling and even fraudulent reimbursement claims are not uncommon in the health care delivery system. *See* United States Government Accounting Office, *Health Care: Consultants' Billing Advice May Lead To Improperly Paid Insurance Claims*,

GAO-01-818 (June 2001). Indeed, the federal government frequently initiates prosecutions for billing abuse and Medicare fraud. *See* United States Department of Justice, *Health Care Fraud Report* (April 2002) (reviewing enforcement efforts). When such overbilling is discovered, MCOs may offset payments or seek affirmative relief against physician groups to obtain monies wrongfully paid. In those disputes, the waiver of punitive relief also operates to cap the damages that can be assessed against a provider or provider group.

2. The provider contracts at issue in this case contain arbitration clauses. Respondent Porth—an orthopedic surgeon in Florida—has entered into a contract with United Healthcare that requires "any disputes about their business relationship" to be resolved through "binding arbitration in accordance with the rules of the American Arbitration Association." Pet. App. 63. Dr. Porth's provider contract also states that the arbitrator shall have no authority to award "extracontractual damages of any kind, including punitive or exemplary damages." *Id.* Respondent Kelly has entered into a similar agreement with United providing that the arbitrator "shall have no authority to award any punitive or exemplary damages." Pet. App. 62. Respondent Breen has similarly entered into an arbitration agreement with PacifiCare Health Systems that precludes the arbitrator from awarding "punitive damages" (Pet. App. 61), and respondent Book has contracted with PacifiCare to submit disputes to an arbitrator authorized to "grant all legal and equitable remedies and [to] award compensatory damages provided by California law, except that punitive damages shall not be awarded" (Pet. App. 60).

3. Citing those arbitration agreements, on September 22, 2000, petitioners PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc. ("PacifiCare") and United Healthcare, Inc. and UnitedHealth Group Inc. ("United"), moved to compel arbitration of the claims asserted by Drs. Breen, Kelly, Porth, and Book. The other MCO defendants also sought orders compelling respondents to arbitrate their aiding-and-abetting and conspiracy RICO claims, which sought to hold



the other MCOs derivatively liable for PacifiCare's and United's conduct toward respondents. The other MCOs asserted that those derivative-liability claims had been pleaded in a transparent attempt to avoid the arbitration agreements that respondents had with PacifiCare and United, and that respondents were estopped from attempting to litigate derivative-liability theories in federal court if respondents would be required to arbitrate with the party that was alleged to be primarily liable.[2]

Respondents opposed arbitration, contending first that the limitations on "punitive" and "extracontractual" damages rendered their arbitration agreements with United and PacifiCare unenforceable, because those limitations purportedly deprived respondents of the ability to obtain treble damages on their RICO claims. Respondents also contended that, notwithstanding their agreement to arbitrate any and all claims with United and PacifiCare, they nonetheless were free to pursue conspiracy and aiding-and-abetting claims against *other* MCO defendants—in court—for their participation in United's and PacifiCare's purported misconduct.

4. The district court granted in part and denied in part the motions to compel arbitration. *See* Pet. App. 11-46, 47-54. Rejecting United's and PacifiCare's contentions that such issues should be decided by the arbitrator in the first

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[2] In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182 (1994), this Court held that 18 U.S.C. § 2 is not "a general civil aiding and abetting statute," and thus cannot be relied on to assert a aiding-and-abetting cause of action under the Securities Exchange Act of 1934. In light of *Central Bank*, several courts of appeals have concluded that 18 U.S.C. § 2 may not be invoked, as respondents seek to do here, to assert a private cause of action for aiding and abetting a RICO violation. *See, e.g., De Falco v. Bernas*, 244 F.3d 286, 330 (2d Cir. 2001); *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 657 (3d Cir. 1998). The district court has so far permitted the "aiding and abetting" claims to proceed by relying on pre-*Central Bank* Eleventh Circuit authority. *See In re Managed Care Litig.*, 135 F. Supp. 2d 1253, 1267 (S.D. Fla. 2001) (citing *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386 (11th Cir. 1994)).

instance, the district court accepted respondents' claims that the various limitations on "punitive" and "extracontractual" damages rendered the arbitration agreements unenforceable with respect to any claim arising under RICO. Relying primarily on the Eleventh Circuit's decision in *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998), the district court reasoned that the "arbitrability of [statutory] claims rests on the assumption that the arbitration clause permits relief *equivalent* to court remedies." Pet. App. 22 (emphasis added) (citation and quotation omitted). The district court opined that because the exclusions for "extra contractual" and "punitive" damages would preclude an arbitrator from awarding "treble" damages under RICO, it would be impossible for the respondents to obtain "meaningful relief in an arbitration forum." Pet. App. 22-23, 29-32, 40-41.

The district court also denied the MCO defendants' motions to compel arbitration to the extent those motions contended that respondents were required to arbitrate all derivative liability theories if they would be required to arbitrate with the party that was primarily liable. The district court concluded that ordinarily a party can be required to arbitrate "only when there is a signed agreement between the parties." Pet. App. 16-22.

5. The Eleventh Circuit affirmed. To the extent relevant here, the court of appeals "affirm[ed] in its entirety the district court's order for the reasons set forth in its comprehensive opinion." Pet. App. 4.[3]

## SUMMARY OF ARGUMENT

The judgment of the court of appeals must be reversed for two independent reasons. First, the court of appeals erred in concluding that the district court—*not* the arbitrator—should determine in the first instance whether the parties'

[3] The court's opinion was primarily devoted to rejecting the MCO defendants' argument that respondents are estopped from litigating the derivative liability claims in court if they agreed to arbitrate with the party alleged to be primarily liable. That issue is not before this Court.



waivers of "punitive" and "extracontractual" damages were valid and enforceable. Under Section 4 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, a district court reviewing a motion to compel arbitration ordinarily has authority to decide only whether the parties have entered into an arbitration agreement and whether the particular claims at issue fall within that agreement's scope. Any question beyond those threshold issues of arbitrability must be decided by the arbitrator in the first instance. Because the validity of the parties' remedial waivers is not a threshold issue of arbitrability, but rather goes to the subsidiary issue of the relief available to respondents if they ultimately prevail on their RICO claims, that question should have been resolved by the arbitrator—*not* the district court—in the first instance. *See* 9 U.S.C. § 4.

Second, the court of appeals erred in concluding that the parties' arbitration agreements were unenforceable because they would deny the respondents "meaningful relief" on their RICO claims. As a preliminary matter, the court of appeals' holding was premised on a determination that the agreements' limitations on "punitive" and "extracontractual" damages would operate to bar an abitrator from awarding "treble" damages under RICO. That determination cannot be reconciled with this Court's holding in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), that treble damages under RICO are "remedial"—not "punitive." Properly construed, a contractual prohibition on "punitive" and "extracontractual" damages does *not* preclude an award of RICO treble damages. The court of appeals thus erred as an initial matter in holding that the arbitration agreements limit RICO remedies *at all*.

In any event, even assuming the parties' agreements did preclude an award of treble damages under RICO, those agreements nonetheless would be enforceable. This Court has never held that an otherwise valid agreement to arbitrate will be deemed unenforceable merely because the parties have elected to narrow the set of remedies the arbitrator can award. Instead, this Court has repeatedly held that arbitration

agreements must be enforced according to their terms, absent a clear indication from Congress to the contrary. This Court has already—and emphatically—held that Congress did *not* intend to preclude the arbitration of claims arising under RICO. *See McMahon*, 482 U.S. at 228. Nothing in RICO's text, structure, or legislative history suggests that Congress had precisely the *opposite* intention with respect to RICO cases in which treble damages might be unavailable.

Moreover, this Court has long recognized that the FAA requires arbitration agreements to be put on an "equal footing" with other contracts. It is axiomatic that, in federal court, parties could agree to waive treble damages, consistent with the long-standing rule that "'[a] party may waive any provision, either of a contract or of a statute, intended for his benefit.'" *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (quoting *Shutte v. Thompson*, 15 (Wall.) 151, 159 (1873)). Because no congressional or federal policy would prohibit such waivers in federal court, the FAA requires that they be enforceable in arbitration. The court of appeals' judgment to the contrary reflects the very hostility to arbitration agreements that the FAA was enacted to prevent. Indeed, even if respondents could carry the heavy burden of demonstrating that the background presumption of waivability does not apply here, the appropriate remedy would not be invalidation of the arbitration agreements, but merely severance of the offending waiver provisions. For all of these reasons, the judgment of the court of appeals must be reversed.

## ARGUMENT

### I. THE ARBITRATOR, NOT THE COURT, SHOULD HAVE DECIDED IN THE FIRST INSTANCE WHETHER THE PARTIES' WAIVER OF "PUNITIVE" DAMAGES APPLIES TO RICO AND IS VALID.

The court of appeals fundamentally erred by deciding, in the first instance, the issue whether a contractual limitation on "punitive" and "extracontractual" damages encompasses treble damages under RICO and whether, if so construed, the



waiver is valid. In ruling upon a motion to compel arbitration, a district court ordinarily is authorized to determine *only* threshold issues of arbitrability—*i.e.*, whether the parties entered into a valid agreement to arbitrate that covers the dispute at hand. Because the validity of a remedial limitation in an arbitration agreement does *not* present a threshold issue of "arbitrability," but instead goes to the downstream, subsidiary issue of the measure of relief available to the plaintiff in the event he ultimately is successful, the arbitrator—*not* the district court—must decide it in the first instance under the FAA. *See* 9 U.S.C. § 4.

#### A. The District Court Should Have Decided Threshold Issues Of Arbitrability Only.

The Federal Arbitration Act was originally enacted in 1925, 43 Stat. 883, and then reenacted and codified in 1947 as Title 9 of the United States Code. "Its purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). In particular, Congress sought to ensure "that the arbitration procedure, when selected by parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

Section 4 of the FAA governs the disposition of motions to compel arbitration and makes clear that a district court's authority to review those motions is heavily circumscribed. It provides that upon petition and

> upon being satisfied that the *making* of the agreement for arbitration or the failure to comply therewith is not in issue, the court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added). As this Court has instructed, "[b]y its terms, [Section 4] leaves no place for the exercise of

discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original).

This Court's cases make clear that Section 4 is designed to ensure that a district court decides *only* those issues relating to whether the arbitration agreement was validly made, and whether the particular claims at issue between the parties fall within the scope of that agreement. The Court has referred to those questions as threshold issues of "arbitrability," and has held that the authority to decide those threshold issues rests presumptively with the courts. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

1. The seminal case construing Section 4 of the FAA is *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). At issue in *Prima Paint* was whether the district court or the arbitrator should consider in the first instance a claim by a party resisting arbitration that the agreement in which the arbitration provision was contained had been induced by fraud. 388 U.S. at 402. Prima Paint entered into a consulting agreement with the Flood & Conklin Manufacturing Company in connection with its acquisition of Flood & Conklin's assets. The agreement contained an arbitration clause. When it became clear that Flood & Conklin would be unable to fulfill its contractual obligations, and that it had misrepresented its financial condition, Prima Paint sued, alleging that the consulting arrangement was void because it had been fraudulently induced. Flood & Conklin moved under Section 3 of the FAA to stay Prima Paint's suit pending arbitration.[4] Prima Paint opposed the stay—and sought an order enjoining arbitration—on the ground that the issue of whether the parties' agreement had been fraudulently induced should be decided by the court—not the arbitrator—in the first instance.

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[4] Section 3 authorizes courts to stay judicial proceedings in any matter that is properly referable to arbitration. *See* 9 U.S.C. § 3.



This Court explained that "Congress ha[d] provided an explicit answer" to the allocation of decision-making authority between courts and arbitrators "in Section 4 of the Act." *Id.* at 403. The Court emphasized that Section 4 authorizes a "federal court [to] consider only issues relating to the *making* and performance of the agreement *to arbitrate*," and that a district court had identical authority when acting pursuant to Section 3. *Id.* 404 (emphasis added). By limiting the district court's focus to the "making" of the arbitration agreement, the Court explained, Section 4 "does not permit the . . . court to consider claims of fraud in the inducement of the contract *generally*," and thus Prima Paint's fraudulent inducement claim would have to be submitted to the arbitrator. *Id.* The Court noted, however, that had Prima Paint asserted a claim for "fraud in the inducement *of the arbitration clause itself*," an issue which the Court described as "go[ing] to the 'making' of the agreement to arbitrate," the district court would have been empowered to adjudicate the claim. *Id.* at 403 (quoting 9 U.S.C. § 4) (emphasis added).

*Prima Paint* draws a clear line between issues that relate to the "'making' of the agreement to arbitrate" or the validity of "the arbitration clause itself"—threshold arbitrability issues that presumptively should be decided by courts—and all other issues, which must be submitted in the first instance to arbitration. *Id.* at 404. This Court's arbitration cases—both before and after *Prima Paint*—are fully in accord with that principle.

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), for example, an employer sought to resist arbitration on the ground that the union had not complied with the notice and exhaustion requirements that the parties' collective bargaining agreement imposed as a prerequisite to arbitration. *Id.* at 555-56. The Court concluded that the parties were bound by a valid arbitration agreement, but held that the employer's procedural defenses to arbitration should be decided by the arbitrator in the first instance. "Once it is determined . . . that the parties are obligated to submit the *subject matter* of the dispute to arbitration," the Court reasoned, other

"questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator." *Id.* at 557 (emphasis added). The Court took particular care to note that, in reviewing motions to compel arbitration, courts should consider only those issues that might "operate to bar arbitration altogether," and *not* issues whose resolution would "merely limit or qualify an arbitral award." *Id.* at 558. Similarly, in *International Union of Operating Engineers v. Flair Builders, Inc.*, 406 U.S. 487 (1972), the Court held that whether arbitration was barred by laches was a question for the arbitrator to decide because the agreement called for arbitration of "any difference" between the parties. The Court noted that courts ordinarily are responsible only for determining "whether a union and employer have agreed to arbitration" as well as "the scope of the arbitration clause." *Id.* at 491. But "once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that the agreement extends to 'any difference' between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement." *Id.* at 491-92.

*Prima Paint*, *John Wiley*, and *Flair Builders* stand for the proposition that claims that can be characterized as going to the validity of "the arbitration clause itself" (*Prima Paint*, 388 U.S. at 400), or the "'making' of the agreement to arbitrate" (*id.* at 404), should generally be decided by courts in the first instance, but that any *other* issues ordinarily must be submitted to the arbitrator. This is true even where, as in *John Wiley* and *Flair Builders*, the claim asserted by the party resisting arbitration, if meritorious, could preclude the need for arbitration at all. *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22 n.27 (1983) (because Congress intended to "speed[] the procedure under § 3 [and] § 4," "some issues that might be thought relevant to arbitrability are themselves arbitrable").

2. This Court also has confined the inquiry under Section 4 to threshold issues of arbitrability in cases where the party resisting arbitration has challenged the propriety of



submitting *statutory* claims to arbitration. In recent years, many plaintiffs have resisted arbitration on the asserted ground that Congress sought to override the FAA's mandate by exempting particular statutes from the FAA's scope. Although this Court has suggested that Congress could conceivably pass statutes that make clear that certain statutory rights are unsuitable for arbitration, it has made clear that any such "congressional command" must be "deducible from [the statute's] text, or legislative history, from an 'inherent conflict' between arbitration and the . . . [statute's] underlying purposes." *See McMahon*, 482 U.S. at 226-27. This Court has been particularly reluctant to find such "statutory directives," and it already—and squarely—has determined that Congress did *not* evidence any such intent in RICO. *Id.* at 226.

For example, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985), the Court considered—and rejected—the claim that treble-damages actions under the Sherman Act are nonarbitrable. Building on the analysis in *Mitsubishi*, this Court has also concluded—in a holding directly controlling here—that Congress did not intend to prohibit arbitration of RICO claims. *See McMahon*, 482 U.S. at 242. The *McMahon* Court explained, first, that "there is nothing in the *text* of the RICO statute that even arguably evinces congressional intent to exclude civil RICO claims from the dictates of the Arbitration Act." *Id.* at 238 (emphasis added). Second, the Court determined that "[t]here [wa]s no hint in the[] *legislative debates* that Congress intended for RICO treble-damages claims to be excluded from the ambit of the . . . [Federal Arbitration] Act." *Id.* (emphasis added). Third, the Court concluded that there was no "irreconcilable conflict between arbitration and RICO's underlying purposes" (*id.* at 239), and that "the public interest in the enforcement of RICO" did not preclude arbitration of RICO claims. *Id.* at 236-40.

*McMahon* is hardly an outlier. In recent years, this Court has upheld arbitration agreements relating to claims

arising under a variety of other statutes.[5] Indeed, since the overruling of *Wilko* in *Rodriguez de Quijas*, it can be said that this Court has not discerned an intention by Congress to preclude the arbitration of *any* federal statutory claim. *See* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 S. CT. REV. 331, 377 (1996) ("In light of *Mitsubishi*, *Rodriguez de Quijas* [and] *Gilmer* . . . it is not clear that there remains any private claim of federal right that cannot be diverted into an arbitral tribunal").

In each of these cases, this Court has adhered to the rule in *Prima Paint*—and to the text of Section 4—by entertaining, at the motion to compel stage, the threshold issue of whether Congress intended claims arising under the statute at issue to be arbitrable at all. It did not engage in a searching inquiry of the particular terms of the parties' agreements, nor review the merits of the asserted claims. As in *Prima Paint*, *John Wiley*, and *Flair Builders*, it merely sought to determine the validity of "the arbitration clause itself" (*Prima Paint*, 388 U.S. at 400) by ascertaining whether Congress sought to preclude arbitration of every single claim under the statute in question.

3. Aside from being compelled by the statutory text and this Court's precedents, the presumptive division of authority between courts and arbitrators reflected in Section 4 and in this Court's cases serves important federal interests. First, the presumption ensures that federal courts will not be required to resolve legal and factual issues prematurely. By confining its consideration to only those issues that will determine in which forum a dispute will be heard, a court avoids entanglement with factual and legal merits-related issues that the arbitral proceeding might render ultimately unnecessary to decide.

Here, for example, the issue that the district court decided—the validity of waiving some of RICO's remedies—

[5] *See, e.g.*, *Gilmer*, 500 U.S. at 24 (ADEA); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)).



may never need to be considered if respondents do not prevail in arbitration on the merits of their RICO claims. Even then, the arbitrator might conclude that the punitive damages exclusion does not apply to RICO "treble" damages or that the waiver is legally unenforceable, as respondents contend. Like the ripeness doctrine, the presumption therefore operates "to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements," particularly when those disagreements are premised on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agricultural Prod. Corp.*, 473 U.S. 568, 580-81 (1985).[6]

Second, the presumption helps to effectuate the FAA's purpose "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22. Requiring district courts to entertain any and every claim that could conceivably bear on arbitrability would transform the expedited review contemplated by Section 4 into a slow, cumbersome process, leading to "delay and obstruction" in the courts (*Prima Paint*, 388 U.S. at 404), and "frustrat[ing] the statutory policy of rapid and unobstructed enforcement of arbitration agreements" (*Moses H. Cone Mem'l Hosp.*, 460 U.S. at 23). By requiring a district court to consider only the threshold arbitrability issues of the existence and scope of an arbitration agreement, however, Congress' goal to provide prompt enforcement of arbitration agreements will be advanced.

[6] Section 10 of the FAA affords courts an opportunity to review arbitral awards, albeit under a deferential standard of review. *See* 9 U.S.C. § 10 (enumerating grounds on which district court may set aside an arbitration award and stating that awards can be vacated if arbitrators "exceeded their powers"); *see also* 9 U.S.C. § 11 (listing grounds for modifying and correcting arbitral awards). This Court has recognized that "'although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer*, 500 U.S. at 32 n.4 (quoting *McMahon*, 482 U.S. at 232).

Third, the presumption advances the likely intentions of the parties. By entering into an arbitration agreement, the parties "grant[] to the arbitrator the authority to interpret the meaning of their contract's language." *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 61 (2000). Part of what the parties have "'bargained for' [is] the 'arbitrator's construction' of their agreement." *Id.* (quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960)). To give effect to that bargain, this Court has made clear that it will "set aside the arbitrator's interpretation of what their agreement means only in rare instances." *Eastern Associated Coal Corp.*, 531 U.S. at 62. Section 4 respects the intentions of the parties by limiting the district court's consideration to threshold issues of arbitrability only and by assigning to the arbitrator the task of interpreting the parties' agreement in the course of resolving the merits of their dispute.

### B. The Validity Of A Remedial Waiver Is Not A Threshold Issue Of Arbitrability.

Respondents' attack on the parties' waiver has *nothing* to do with the "making" of the agreement to arbitrate, or with the validity of the arbitration clause itself, but rather goes to the subsidiary (and manifestly contingent) issue of the remedies available to respondents in the event they ultimately prevail on their RICO claims. Section 4—as interpreted by *Prima Paint* and its progeny—requires that issue to be decided by the arbitrator in the first instance.

1. Respondents seek to avoid that conclusion by relying on the "two-step inquiry" undertaken in *Mitsubishi*, *McMahon*, and *Gilmer*. *See* Resp. Br. in Opp. at 9-10. Respondents rely principally on the passage in *Mitsubishi* stating:

> In sum, the Court of Appeals correctly concluded a two-step inquiry, first determining whether the parties' agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties' agreement foreclosed arbitration of those claims.



*Mitsubishi*, 473 U.S. at 627-28; *see also Gilmer*, 500 U.S. at 20-21; *McMahon*, 482 U.S. at 226-27. According to respondents, the second step of that inquiry authorizes courts—when reviewing a motion to compel arbitration under Section 4—to entertain *any* challenge to an arbitration agreement, so long as it is assertedly founded on external "legal constraints," and in particular respondents' generalized assertions of congressional "policy" or "intent." Opp. 12 n.3.

Respondents' reading of the second step of the *Mitsubishi* inquiry is vastly overbroad and cannot be reconciled with the text of Section 4 or with *McMahon*. To begin with, the core holding of *McMahon* is that *no* "external" "legal constraint" prohibits arbitration of RICO claims. The "two-step inquiry" to which respondents advert has already been undertaken—and resolved against respondents—in *McMahon*.

In any event, the second step of the *Mitsubishi* inquiry does not authorize courts to engage in a free-wheeling inquiry into every conceivable defense to arbitrability. *See McMahon*, 482 U.S. at 227 (stating that issue is limited to whether "Congress intended to make an exception to the Arbitration Act for claims arising under . . . the statute" in question); *Gilmer*, 500 U.S. at 26 (issue is whether "Congress intended to preclude a waiver of a judicial forum for" claims arising under the statute at issue). The second-step of the *Mitsubishi* inquiry asks only whether any limitation grounded in positive law *categorically* exempts particular statutory claims from the reach of the FAA. *See McMahon*, 482 U.S. at 227; *see also Gilmer*, 500 U.S. at 26. It does not confer unbridled discretion on district courts to entertain case-by-case "public policy" defenses to arbitrability grounded on the particular terms of the parties' agreement.

That is why respondents err in suggesting that the *Mitsubishi* "two-step inquiry" expands the limited scope of issues that can be considered under Section 4. The defenses to arbitration asserted in *Gilmer*, *McMahon*, and *Mitsubishi* are best

understood as having been directed to the validity of "the arbitration clause itself" (*Prima Paint*, 388 U.S. at 402), because each of those cases was concerned with whether Congress by "statutory directive" had foreclosed arbitration for the *entire* "category" (*Mitsubishi*, 473 U.S. at 627) of claims that could be asserted under the statute in question. What the Court sought to determine was whether "[C]ongress[] inten[ded] to make an exception to the Arbitration Act for RICO claims," Sherman Act claims, and ADEA claims (*McMahon*, 482 U.S. at 242)—an exception that would make *any* agreement to arbitrate those claims invalid. That question presented a threshold issue of arbitrability in the most basic sense. Respondents' challenges to limitations on the damages that might ultimately be recoverable in an arbitration proceeding, by contrast, are analytically distinct from the contention that Congress intended to preclude any claims under the statute at issue from being arbitrated *at all*.

Indeed, virtually *any* defense to arbitration could be inventively recharacterized as a defense emanating from abstract "congressional policies." The multiplicity of issues that could be raised at the motion to compel stage under such a regime would contradict the text of Section 4 and frustrate Congress' goal "to move the parties to an arbitrable dispute out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22; *cf. Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984) ("prolonged litigation" is "one of the very risks the parties, by contracting for arbitration, sought to eliminate").

2. Nor can respondents find support for their position in *Green Tree Financial*. *Green Tree Financial* held that the mere fact that an arbitration clause is silent with respect to the allocation of costs does not by itself render the arbitration agreement unenforceable. 531 U.S. at 91. Because the case was decided on appeal from an order denying a motion to compel arbitration, respondents suggest that the Court implicitly accepted the proposition that "public policy" defenses to arbitration can appropriately be raised with the district court in the first instance. Opp. at 8. But *Green Tree Financial* cannot be read as establishing a blanket rule that any defense to arbitration founded on an asserted federal or congressional "policy" should be decided by courts in the first instance. To begin with, the issue of whether the arbitrator should decide the "expense" argument was not raised in *Green Tree Financial*. Thus, *Green Tree Financial* cannot be dispositive on that question. *See United States v. Shabani*, 513 U.S. 10, 16 (1994) ("questions which merely lurk in the record are not resolved, and no resolution of them may be inferred").



More importantly, *Green Tree Financial* involved a claim that the arbitral forum itself was not reasonably available to one of the parties, because of costs associated with arbitration. Requiring a party to raise such an "accessibility" argument in a tribunal that party alleges is not accessible would potentially deprive that party of the opportunity to raise its challenges to the arbitration agreement. That claim—which essentially challenges the arbitration clause *itself* as unconscionable—is analogous to the type of inquiry permitted by *Prima Paint*. In any event, that principle simply has no application here. Here, there is *no* risk that the party resisting arbitration will be deprived of an opportunity to assert its challenges to the arbitration agreement. Indeed, in a ruling from which respondents did not appeal, the district court found that respondents are "sophisticated actors" and was "unpersuaded" that respondents' "statutory claims will not be vindicated in an arbitration forum due to excessive filing fees and costs." *In re Managed Care Litig.*, 132 F. Supp. 2d 989, 998 (S.D. Fla. 2000). Respondents may not be able to obtain *judicial* review of their challenge to the punitive damage waiver until the arbitration has been concluded, but the forum accessibility concerns that justified front-end judicial review under Section 2 in *Green Tree Financial* are not present here. *Green Tree Financial* simply does not advance respondents' cause.

3. In short, this Court's decisions in *Mitsubishi*, *McMahon*, *Gilmer*, and *Green Tree Financial* do not establish any sort of "exception" to Section 4 of the FAA. Like *Prima*

*Paint*, *John Wiley*, and *Flair Builders*, those cases stand only for the proposition that courts should decide threshold issues of arbitrability, leaving other issues to the arbitrator to resolve in the first instance. Under *no* reading of Section 4 can respondents' challenge to the contractual limitations on the remedies that ultimately might be—or might not be—awarded be construed as going to the validity "of the arbitration clause itself" (*Prima Paint*, 388 U.S. at 402). Accordingly, respondents' challenge does not constitute a threshold issue of arbitrability and should not have been decided by the district court in the first instance. The court of appeals' conclusion to the contrary must be reversed.

## II. AGREEMENTS THAT PRECLUDE ARBITRATORS FROM AWARDING "PUNITIVE" DAMAGES ARE VALID AND ENFORCEABLE IN BOTH ARBITRAL AND JUDICIAL PROCEEDINGS.

Even if it had been proper for the court of appeals to rule upon the validity of the parties' waivers of "punitive" and "extracontractual" damages, reversal nonetheless would be warranted. The court of appeals erred in concluding that the arbitration agreements preclude the arbitrator from awarding treble damages on respondents' RICO claims. By their terms, the parties' agreements do not even purport to deprive any party of the right to seek "treble damages" under RICO—they ban "punitive" and "extracontractual" damages only—and thus the agreements can be enforced according to their terms without implicating any congressional "policy" about the waiver of statutory remedies. In any event, even assuming the parties' agreements *did* preclude an award of treble damages under RICO, those agreements would be valid and enforceable—in both arbitral and judicial proceedings.



### A. The Parties' Agreements, When Properly Construed, Do Not Preclude An Award Of Treble Damages.

The court of appeals' conclusion that the parties' arbitration agreements violate congressional "policy" was premised on its determination that the arbitration agreements forbid the award of treble damages to a RICO plaintiff. That determination was erroneous. Properly construed, the parties' arbitration agreements do *not* preclude the arbitrator from awarding treble damages under RICO. Instead, the agreements preclude arbitrators from awarding "punitive or exemplary damages" ((Pet. App. 62) (Kelly-United)), "extracontractual damages of any kind, including punitive or exemplary damages" ((Pet. App. 63) (Porth-United)), and "punitive damages" ((Pet. App. 60-61) (Breen-PacifiCare and Book-PacifiCare)).

As this Court recognized in *McMahon*, treble damages under RICO are primarily designed to *compensate* an injured party rather than to punish a wrongdoer. *See McMahon*, 482 U.S. at 240. In rejecting the contention that arbitration of RICO claims would undermine the "public policy" goals served by the statute, the Court explained that RICO's treble-damages provision serves a private, "remedial" role and that its "policing function, although important," was "secondary." *Id.* at 241-42; *see also id.* at 240 ("The legislative history of § 1964(c) reveals [an] emphasis on the remedial role of the treble-damages provision"). Indeed, the Court distinguished RICO claims from Sherman Act claims in that respect, noting that the "private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff" because RICO actions "are seldom asserted against the archetypal intimidating mobster" in an effort to advance the statute's aim to "fight against organized crime," but are instead most commonly "brought against legitimate enterprises." 482 U.S. at 241-42 (quotations and citations omitted). The fact that RICO allows for accumulated recovery simply does not convert its otherwise "remedial" scheme into a "punitive" one.

*McMahon* makes clear that treble damages under RICO are not properly characterized as "punitive" or "exemplary" damages within the meaning of the parties' arbitration agreements. Indeed, the distinction between punitive and treble damages makes sense "from the standpoint of the parties' expectations when they entered the arbitration agreement." *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 317 (5th Cir. 2002). "[S]tatutory multiple damages differ from . . . common law punitive damages in that punitive damages involve no fixed sum or limit." DAN B. DOBBS, LAW OF REMEDIES § 3.12 at 543 (2d ed. 1993). Common law punitive damages "are awarded under notoriously open-ended legal standards and a broadly defined constitutional limit concerning the amount awarded," while treble damages "represent a mere mathematical expansion of the actual damages calculated by the arbitrator." *Investment Partners*, 298 F.3d at 317. For that reason, private parties might well exclude common law punitive damages but nonetheless vest the arbitrator with authority to award any treble damages authorized by statute. Construing the terms "punitive" and "exemplary" as excluding RICO treble damages thus is consistent with this Court's construction of RICO (*see McMahon*, 482 U.S. at 241) and with the parties' likely intentions.[7]

Each of the arbitration agreements in this case could plausibly be read to permit an arbitrator to award every form of relief afforded by RICO, *including* treble damages. By so interpreting the parties' arbitration agreements, respondents' objections to arbitration would be rendered irrelevant, and the arbitration agreements could be enforced according to their terms without implicating any "public policy" concerns about limitations on statutory remedies.

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[7] Similarly, the term "extracontractual" is a term of art that would preclude the arbitrator from awarding non-economic damages on contract-based claims but would not prevent an award of treble damages under RICO. *See* DAN B. DOBBS, LAW OF REMEDIES § 12.1(1) at 753 (2d ed. 1993) ("Punitive damages and mental anguish damages are . . . considered 'extracontractual'").



### B. In Any Event, No Congressional Policy Precludes Parties From Agreeing To Waive Treble Damages Under RICO.

Even assuming that the parties' agreements are best read as preventing an arbitrator from awarding treble damages to a RICO plaintiff, those agreements would be enforceable. As this Court has repeatedly recognized, one of "[t]he preeminent concern[s] of Congress in passing the [Federal Arbitration] Act" was to ensure that arbitration agreements were "rigorously enforce[d]" (*Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)), like other contracts, "*according to their terms*, and according to *the intentions of the parties*" (*First Options*, 514 U.S. at 947 (citation and quotation omitted) (emphases added)).

1. This Court has repeatedly held that under the FAA parties are free "to structure their arbitration agreements as they see fit." *Volt Info. Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989). In *Volt*, for example, this Court held that the FAA did not preempt a California statute authorizing a trial court to stay arbitration proceedings pending resolution of related litigation, because the parties had agreed that their arbitration agreement would be governed by California law. Indeed, even though the FAA did not authorize a trial court to enter a stay in such circumstances, and even though such a stay would have deferred prompt and expeditious resolution of the arbitrable claims, this Court made clear that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules" and that "the federal policy is simply to ensure the enforceability, *according to their terms*, of private agreements to arbitrate." *Id.* at 476 (emphasis added). To invalidate the election of California law in the parties' agreement, the Court concluded, "would be quite inimical to the FAA's primary purpose." *Id.* at 479.

*Volt* is merely illustrative of the deference afforded to parties to structure their arbitration agreements "as they see fit" (*Volt*, 489 U.S. at 479) under the FAA. Parties are obviously free to exclude claims from an agreement to arbitrate

(*see Mitsubishi*, 473 U.S. at 625), and they are free to specify that an *arbitrator*—not a court—must decide threshold issues of arbitrability in the first instance (*see First Options*, 514 U.S. at 943). Indeed, this Court has concluded—at least with respect to state-law claims—that parties can freely waive their right to punitive recoveries. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56-57 (1995) ("if the contract [in effect] says 'no punitive damages,' that is the end of the matter, for courts are bound to interpret contracts in accordance with the expressed intentions of the parties"). As the lower courts have recognized, "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes." *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (Posner, J.) (collecting authorities).

What the FAA does *not* permit is the invalidation of arbitration agreements under "laws applicable *only* to arbitration provisions." *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (emphasis in original). The entire purpose of the FAA was "'to revers[e] centuries of judicial hostility to arbitration agreements [by] plac[ing] arbitration agreements upon the *same footing* as other contracts.'" *McMahon*, 482 U.S. at 225 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974)) (emphasis added). Thus, Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Any legal principle—including a state-law principle—"that takes its meaning precisely from the fact that a contract to *arbitrate* is at issue does not comport with the text of § 2." *Casarotto*, 517 U.S. at 685 (internal brackets and quotation omitted).

The FAA's nondiscrimination principle seeks to ensure equal treatment between agreements to arbitrate and any other agreements enforceable in federal (or state) court. Thus, the district court and court of appeals erred in suggesting that arbitration agreements are merely forum selection



clauses that cannot contain any substantive waivers of statutory rights. *See* Pet. App. 22 (stating that remedies in arbitration must be "equivalent" to court remedies). Although this Court has stated that "'by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute [but] only submits to their resolution in an arbitral, rather than a judicial, forum" (*Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628)), it was merely describing the ordinary consequences of an arbitration agreement, *not* declaring a federal policy prohibiting parties from waiving any substantive rights in arbitration. Congress has *never* evidenced that intention—under the FAA, RICO, or any other federal statute.

To the contrary, the FAA's nondiscrimination principle makes clear that if parties can lawfully waive substantive rights in federal court, they also can waive those rights in an arbitration agreement. Indeed, to deny enforcement in an arbitration agreement of a waiver that would be enforceable in federal court would be to indulge the very "hostility" and "outmoded" suspicion of arbitration agreements the FAA was enacted to eradicate. *Rodriguez de Quijas*, 490 U.S. at 481; *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 270 (1995). Such a rule "would place arbitration clauses on an unequal footing, directly contrary to the Act's language and Congress's intent." *Casarotto*, 517 U.S. at 686 (quotation and citation omitted).

2. That principle controls this case. This Court has long recognized that—in cases litigated in a judicial forum—"'[a] party may waive any provision, either of a contract or of a statute, intended for his benefit.'" *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995) (quoting *Shutte v. Thompson*, 15 (Wall.) 151, 159 (1873)). Indeed, "absent some affirmative indication of Congress' intent to preclude waiver, [this Court] ha[s] presumed that statutory provisions are subject to waiver by *voluntary agreement of the parties*." *Mez-*

*zanatto*, 513 U.S. at 201 (emphasis added).[8] RICO was enacted against this background "presumption of waivability" (*id.* at 204), and thus a RICO plaintiff is as much at liberty to waive his right to treble damages as is a criminal defendant to waive protections afforded by the Constitution.

This Court has repeatedly held that parties in a judicial forum are free to waive their right to statutorily prescribed remedies. In *Evans v. Jeff D.*, 475 U.S. 717 (1986), for example, the Court concluded that a private plaintiff could validly waive his right to an award of attorney's fees under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988 ("Fees Act"), as part of a negotiated settlement. The Court explained that nothing in the text or legislative history of the Fees Act "support[ed] . . . the proposition that Congress intended to ban all fee waivers," notwithstanding the fact that Congress had established fee awards "as an integral part of the remedies necessary to obtain compliance with civil rights laws" and to add "to the arsenal of remedies available to combat violations of civil rights." *Id.* at 730-32. The Court rejected the contention that such waivers could "deter attorneys from representing plaintiffs in civil rights suits," noting in particular that fee proponents had "not offered to *prove* that petitioners' tactics [in proposing a settlement with no fee award] . . . implemented a . . . policy designed to frustrate the objectives of the Fees Act." *Id.* at 740 (emphasis added).

As was true of the Fees Act in *Evans*, there is nothing in RICO's text or legislative history to suggest that Congress intended to preclude parties from waiving the right to recover

[8] In *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945), this Court held that employees could not waive the statutory entitlement to liquidated damages recoverable from an employer who violates the minimum wage or maximum hour requirements of the Fair Labor Standards Act of 1938 ("FLSA") because "the structure and legislative history of the FLSA evinced a specific 'legislative policy' of 'preventing private contracts' on such matters." *Mezzanatto*, 513 U.S. at 206 n.4 (quoting *Brooklyn Sav. Bank*, 324 U.S. at 706). Nothing in the text, structure or history of RICO evinces a similar intention to prevent private bargaining.



treble damages. *See McMahon*, 482 U.S. at 240-42. Indeed, at no stage in this case have respondents ever identified the source in positive law that ostensibly "evidences" a congressional "policy" to preclude arbitration of RICO claims when treble damages are unavailable. The mere fact that Congress *authorized* a treble-damages remedy under RICO does not mean that Congress deemed that remedy to be so indispensable to RICO's goals that it intended to preclude arbitration whenever that remedy was unavailable, just as the fact that Congress expressly authorized a judicial forum for resolution of claims under Section 12(2) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 did not mean that Congress intended to preclude non-judicial resolution of those claims. *See Rodriguez de Quijas*, 490 U.S. at 482; *McMahon*, 482 U.S. at 227-28.

Respondents thus are left to contend that "the restricted remedies afforded by the arbitration clause" somehow conflict with the "public policy" interest in RICO enforcement. Opp. 11. But *McMahon* itself makes clear that RICO's treble-damages provision was enacted primarily for the "remedial" purpose of providing *compensation* to injured parties, and that the goal of fighting organized crime through private civil claims was merely "secondary." *Id.* at 242. Indeed, Congress has not deemed the treble-damages remedy to be so critical to RICO's deterrent aims that it has authorized the Attorney General to seek such relief. *See* 18 U.S.C § 1964(c); *United States v. Bonnano*, 879 F.2d 20, 26 (2d Cir. 1989) (concluding that "Congress did not intend to authorize treble damage actions by the United States pursuant to 1964(c)").[9]

[9] Indeed, if any congressional "policy" has been contravened in these proceedings, it is the policy forbidding parties to circumvent otherwise enforceable arbitration agreements through strategic pleading exercises. *See* 9 U.S.C. § 2. Respondents have effectively thwarted the FAA's policy favoring arbitration by asserting boilerplate conspiracy and aiding-and-abetting claims against nonsignatories to the arbitration agreements. Respondent Dr. Breen, for example, entered into contracts containing arbitration clauses with Blue Cross of California, Healthnet, and peti-

In any event, whatever incidental effect enforcement of RICO's treble-damages provision might have on the public interest does not render that provision unwaivable, for it simply "is *not* true that any private right that also benefits society cannot be waived." *New York v. Hill*, 528 U.S. 110, 117 (2000) (emphasis in original). The vindication of *every* statutory right ordinarily confers at least *some* benefit on the public, but those incidental effects do not overcome "the background presumption of waivability" (*Mezzanatto*, 513 U.S. at 206) applicable to rights enacted for the benefit of private parties. Society's interest in enforcement of RICO's treble damages provision simply is not "part of the unalterable statutory policy" of RICO (*Hill*, 528 U.S. at 117) (quotation and citation omitted)—as *McMahon* expressly and emphatically held. That is why the statutory entitlement to treble damages can be waived in federal court, and why *a fortiori* it can be waived in an agreement to arbitrate. *See* 9 U.S.C. § 2; *Casarotto*, 517 U.S. at 687. Like any other agreement enforceable in federal court, the parties' arbitration agreements should have been enforced "according to their terms." *First Options*, 514 U.S. at 947. The court of appeals' failure to do so warrants reversal.

### C. Respondents' RICO Claims Must Be Arbitrated Even If The Remedial Waivers Are Unenforceable.

In any event, even assuming that the remedial waivers in the parties' arbitration agreements are unenforceable, respondents would still be required to arbitrate their RICO claims. The principles of severance applicable to contracts

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[Footnote continued from previous page]

tioner PacifiCare. Yet by asserting RICO conspiracy and aiding-and-abetting allegations against each defendant for facilitating the other defendants' alleged breach of their contractual obligations to Breen, Breen is permitted to litigate RICO claims against *all three* defendants, effectively depriving *all three* defendants of the principal benefit of their respective arbitration agreements—*i.e.*, the speedy and economical arbitral resolution of their business disputes with physicians.



governed by the FAA would require the limitations provisions to be severed from the rest of the arbitration agreement. The parties thus would remain obliged to arbitrate the RICO claims, but the arbitrator would be empowered to award treble damages.

The FAA "creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the meaning of the Act." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25. That body of federal arbitrability law requires application of "the ordinary state-law principles that govern the formation of contracts" (*First Options*, 514 U.S. at 944), but with due regard for the "liberal"—indeed, the "emphatic" (*Mitsubishi*, 473 U.S. at 631)—"federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24.

Those principles require, in the event the remedial limitations are deemed unenforceable, that the offending provisions be severed either in accordance with the applicable state's contract law (*see Gannon v. Circuit City Stores, Inc.*, 262 F.3d 677, 680-82 (8th Cir. 2001) (concluding that, under Missouri law, provisions barring award of punitive damages were severable)), or—if state law would not provide for severance in the circumstances—by operation of the federal common law of arbitrability, which demands that arbitration agreements be construed liberally in favor of arbitrability. *See First Options*, 514 U.S. at 945. Indeed, a state law that did *not* authorize severance likely would be preempted by the force of the FAA's command to give effect to the parties' unambiguous selection of an arbitral forum. *See Southland Corp.*, 465 U.S at 16 ("Congress intended to foreclose state [law] attempts to undercut the enforceability of arbitration agreements").

The district court and court of appeals held—apparently as a matter of federal common law—that an arbitration agreement that contains a purportedly invalid limitation on punitive damages renders the agreement to arbitrate itself unenforceable. That rule is predicated on the Eleventh Circuit's

belief that to enforce arbitration agreements notwithstanding such infirmities would create incentives "to include unlawful provisions in . . . arbitration agreements." *Perez v. Globe Airport Sec. Servs., Inc.*, 253 F.3d 1280, 1287 (11th Cir. 2001). But taken to its logical conclusion, the Eleventh Circuit's severance rule would require invalidation of arbitration agreements whenever those agreements contained *any* unenforceable terms. That result cannot possibly be reconciled with this Court's oft-repeated command to construe agreements in favor of arbitrability, particularly when—as is true here—the agreements leave no room to doubt that the parties intended to resolve "any disputes" (Pet. App. 62-63) through *arbitration*. The invalidation of the parties' remedial waivers would do *nothing* to vitiate the parties' unmistakable election of an arbitral over a judicial forum, and to honor that contractual intent requires arbitral resolution of the RICO claims *even if* the remedial waivers are deemed invalid.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 02-215

# In the Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., *et al.*,

*Petitioners,*

v.

JEFFREY BOOK, D.O., *et al.*,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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### INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States (the Chamber) is the world's largest business federation representing an underlying membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

Many of the Chamber's members have adopted as standard features of their business contracts provisions that mandate the arbitration of disputes arising from those agreements. Many arbitration provisions preclude the award of punitive damages by the arbitrator. The enforceability of these arbitration agreements, including their limits on punitive damages, is essential to ensuring that the parties receive the benefit of the dispute resolution mechanism for which they bargained. The many businesses that routinely employ arbitration to resolve their disputes also have a strong interest in ensuring that they remain free to structure future arbitra-

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[1] The parties have consented to the filing of this brief; the written consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

tion agreements according to their wishes and the wishes of their contracting partners.

The Eleventh Circuit's decision that arbitration agreements that preclude the award of punitive damages can be avoided by filing a RICO claim (which would appear to apply equally to cases alleging any federal or state statutory cause of action that allows for punitive or multiple damages) will weaken many existing arbitration agreements and limit the ability of businesses freely to negotiate future arbitration agreements. Accordingly, the Chamber's members have a strong interest in encouraging this Court to reverse the decision below.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Contractual provisions mandating the arbitration of disputes between the parties have become increasingly common. Corporations and individuals alike have recognized that arbitration has many advantages over traditional litigation. Chief among these advantages is the flexibility to tailor dispute resolution procedures and remedies to the nature of the contract and the circumstances of the parties. Recognizing that this is one of the principal benefits of arbitration, and consistent with the general federal policy favoring arbitration, this Court has repeatedly stated that the contracting parties may structure their arbitration agreements as they see fit. Following this Court's lead, the vast majority of federal circuits that have addressed the issue have held that parties may enter into mandatory arbitration agreements while waiving their right to obtain punitive damages in the arbitration.

In the decision below, the Eleventh Circuit ruled that an arbitration agreement that waives punitive damages cannot be enforced when one party alleges that the other violated the federal RICO statute. The decision imposes a categorical rule that contracting parties who agree to submit their disputes to an arbitrator ***cannot*** also agree to forgo treble dam-



ages under RICO. Moreover, because the Eleventh Circuit's decision was not tethered to any particular Congressional interest in enforcing RICO, the court's reasoning would seem to apply to any claim under a federal or state statute that permits the recovery of multiple or punitive damages.

Unless it is reversed, therefore, the ruling will mean that parties that have already entered into arbitration agreements that waive punitive damages will be able to bypass arbitration altogether if they can frame a dispute as a RICO claim or another statutory claim that provides for punitive or multiple damages. To avoid this gaping loophole, moreover, future arbitration agreements that generally waive punitive damages will have to expressly exclude from the waiver the many federal and state statutory causes of action that provide for punitive or multiple damages. This state of affairs will strongly encourage future claimants to pursue RICO claims (and other federal and state statutory claims) in addition to, or instead of, more straightforward common law claims as to which punitive damages have been waived. To the extent that businesses are not willing to entrust an arbitrator with a multiple-damages or punitive damages remedy – but do not wish to encourage RICO claims (or claims under other statutory regimes) by excluding ***only*** those causes of action from arbitration – the rule will simply discourage the formation of agreements to arbitrate.

The Eleventh Circuit's decision is thus inconsistent with the strong federal policy preference for arbitration. It fails to give sufficient weight to the interest of the contracting parties in freely deciding, ***before*** they are embroiled in a dispute, what remedies they wish to make available to the arbitrator. And, by giving an unjustified preference to RICO's treble-damages provision, it will encourage frivolous claims under this statute. Accordingly, the Chamber urges the Court to reverse the Eleventh Circuit's decision.

## ARGUMENT

### A. There Are Good Reasons For Both Parties To A Contract To Agree To Mandatory Arbitration Of Their Disputes

Arbitration is a process in which "one or more third-party neutrals review facts and arguments from both sides during an adversarial hearing, apply legal standards, and render a decision on the merits." 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 42.4(c)(2) (Robert L. Haig ed. 1998). This alternative to traditional litigation for resolving disputes has long received the law's endorsement. The Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, enacted in 1925, established "a liberal federal policy favoring arbitration agreements" in which "any doubts concerning the scope of arbitrable issues [is] resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). To that end, the FAA requires "courts to enforce arbitration agreements into which parties had entered and to place such agreements upon the same footing as other contracts." *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 271 (1995) (internal quotation marks and citations omitted).

There are many reasons why parties to a contract might agree to arbitrate disputes arising from their business relationship rather than proceed to court. Arbitration "'is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling of times and places of hearing and discovery devices.'" *Allied-Bruce*, 513 U.S. at 280 (quoting H.R. Rep. No. 542, 97th Cong., 2d Sess. 13 (1982)). These advantages are particularly "helpful to individuals * * * who need a less expensive alternative to litigation." *Ibid.* In fact, a recent study that compared employment claims filed with the



American Arbitration Association with similar claims filed in federal court determined that, on average, the cases that went to arbitration were resolved in half the time that it took to resolve cases that were litigated in court. See Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998). Indeed, Congress recently reaffirmed its view that arbitration helps avoid the "delays, expense, uncertainties, loss of control, adverse publicity, and animosities that frequently accompany litigation." Y2K Act of 1999, Pub. L. No. 106-37 § 2(a)(3)(B)(iv), 113 Stat. 186.

Arbitration agreements possess the particular benefit of allowing the contracting parties to select the dispute resolution procedures and remedies that are most appropriate to their circumstances, including the nature of the contract and the types of disputes likely to arise under it. This Court has recognized that "[a]rbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc.* v. *Board of Trustees of Leland Stanford, Jr. Univ.*, 489 U.S. 468, 479 (1989); see also *ibid.* (the parties may "specify by contract the rules under which * * * arbitration may be conducted").

There is little, if any, down side to arbitration to offset its numerous advantages. Importantly, there is no evidence that the additional speed and flexibility of arbitration is achieved at the cost of procedural fairness associated with traditional litigation. This Court has "decline[d] to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 (1985). Nor does arbitration disproportionately benefit large corporate entities at the expense of individuals. To the contrary: a recent study of the results in arbitration and litigation for similar cases determined that individuals are four times

more likely to prevail in arbitration than in litigation. See Maltby, 30 COLUM. HUM. RTS. L. REV. at 46-48. And, win or lose, the vast majority of those participating in arbitration are satisfied with the process. A study of securities arbitration, for example, indicated that over 90 percent of the participants believed that their cases were handled fairly. See Gary Tidwell, *et al.*, *Party Evaluation of Arbitrators: An Analysis of Data Collected from NASD Regulation Arbitrations*, at 25 (Aug. 5, 1999) (presented to the National Meeting of the Academy of Legal Studies in Business).

### B. It Is Reasonable For Parties To An Arbitration Agreement To Choose To Waive Claims For Punitive Damages

In interpreting a contract, courts look to the contracting parties' intentions, because the parties are the best judge of their own self-interest. See Richard A. Posner, ECONOMIC ANALYSIS OF LAW 105 (5th ed. 1998). A clause in a contract that specifies that all disputes related to the contract are to be arbitrated, and provides that the arbitrator may not award punitive damages, is no less a product of rational self-interest.

There is good reason for parties who wish to submit their disputes to arbitration nonetheless to be wary of allowing an arbitrator to award punitive damages. Arbitration agreements generally provide for limited discovery and simplified procedures. Indeed,

> it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies.

*Mitsubishi Motors Corp.*, 473 U.S. at 633.



But the parties to a contract may be less comfortable giving up the panoply of procedural rights associated with full-blown litigation if the wild card of punitive damages is introduced. Nothing prevents an arbitrator from imposing a punitive sanction as large as one that a jury might impose. Neil Vidmar, *Are Juries Competent to Decide Liability in Tort Cases Involving Scientific/Medical Issues? Some Data from Medical Malpractice*, 43 EMORY L.J. 885, 907 (1994) (data does not support the hypothesis that juries award larger punitive awards than arbitrators). Moreover, "[i]f an arbitrator makes a mistake of law, or even an egregious error interpreting a contract, his decision is not subject to judicial review." Jordan L. Resnick, Note, *Beyond Mastrobuono: A Practioners' Guide to Arbitration, Employment Disputes, Punitive Damages, and the Implications of the Civil Rights Act of 1991*, 23 HOFSTRA L. REV. 913, 970 (1995). Only if the arbitrator exceeds his authority or commits misconduct can an award be challenged in court. 3 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 42.4(c)(2). With such limited appellate review of an arbitrator's award, the contracting parties may well decide that the risk of a punitive award being assessed against them outweighs the possible benefit of receiving such an award, particularly if they do not know in advance whose ox will be gored.

Furthermore, *ex ante*, the "cost" of precluding punitive damages for all disputes related to the contract is likely – and accurately – to be perceived as minimal. As a general rule, punitive damages may not be awarded for breach of contract. See John J. Kircher & Christine M. Wiseman, PUNITIVE DAMAGES: LAW AND PRACTICE § 5:07 (2d ed. 2000); RESTATEMENT (SECOND) OF CONTRACTS § 355 (1979). Accordingly, it is quite reasonable for self-interested parties who wish to resolve any future business disputes quickly and efficiently to agree to an arbitration provision that includes a punitive damages waiver.

It also is rational for the parties to include statutory claims for multiple damages in any waiver of punitive damages.[2] First, if the compensatory damages are sufficiently high, treble damages may constitute very significant punishment; a party may reasonably be reluctant to risk such a punishment in an arbitral forum that provides only limited rights of appeal. Second, preserving statutory claims for multiple damages while waiving other such claims may create perverse incentives: such an agreement will inevitably encourage resort to the "privileged" statutory claims, increasing the cost and complexity of the arbitration proceedings. Indeed, it would be ironic if, by precluding the award in arbitration of punitive damages for state-law fraud claims, a business ended up encouraging its contractual partners to raise RICO, antitrust, or Lanham Act claims against it in order to escape the impact of that waiver.

Given the strong federal policy favoring arbitration, and this Court's mandate that arbitration agreements be interpreted in the same way as other contracts, it is not surprising that the overwhelming majority of federal appeals courts that have addressed the issue have held that "the parties can stipulate to whatever procedures they want to govern the arbitration of their disputes * * * [and] surely can stipulate that punitive damages will not be awarded." *Baravati* v. *Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994). See, *e.g.*, *Inv. Partners, L.P.* v. *Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 (5th Cir. 2002); *Long* v. *Silver*, 248 F.3d

[2] The Chamber takes no position on whether the parties in this case, in entering into the arbitration clauses at issue, intended to waive federal statutory claims for multiple damages. For purposes of this *amicus* brief, however, we assume that the Court will conclude that at least one of those arbitration clauses waives claims for treble damages under RICO and therefore will reach the question of whether such a waiver renders the agreement to arbitrate unenforceable.



309, 319 (4th Cir.), cert. denied, 122 S. Ct. 213 (2001); *Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 939-940 (10th Cir. 2001); *Davis* v. *Prudential Sec., Inc.*, 59 F.3d 1186, 1189 (11th Cir. 1995); *Raytheon Co.* v. *Automated Bus. Sys., Inc.*, 882 F.2d 6, 12 (1st Cir. 1989); *Surman* v. *Merrill Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 63 (8th Cir. 1984).

Indeed, even outside the context of arbitration, this Court has upheld the right of the parties to a contract to determine the rights and remedies that will govern their relationship. In *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), for example, this Court upheld the enforceability of a contractual forum selection clause that affected the parties' substantive rights, concluding that the clause "should control absent a strong showing that it should be set aside." *Id.* at 15. Specifically, a party seeking to avoid a forum selection clause must "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." *Ibid.* Of particular note, the Court observed that "it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." *Id.* at 14.

The lower courts also have overwhelmingly enforced contractual forum selection and choice-of-law provisions, even when by choosing the law of a particular jurisdiction the parties give up rights that otherwise would be available to them – including the right to seek punitive damages. See, *e.g.*, *Moses* v. *Bus. Card Express, Inc.*, 929 F.2d 1131, 1139 (6th Cir. 1991) (plaintiffs "cite no case in which it has been held that a state's dominating public interest is violated by requiring its citizens and residents to try a lawsuit in another jurisdiction with a different rule on punitive damages where the parties have agreed that the other state's substantive law is controlling").

Accordingly, the Eleventh Circuit's decision that RICO treble damages may not be waived represents a marked departure from the general rule that parties to contracts may decide how their disputes will be resolved. As discussed below, this departure is contrary to the federal policy favoring arbitration and is not justified by the purposes of the RICO statute.

### C. The Eleventh Circuit's Decision Interferes With The Freedom Of The Parties To Negotiate Appropriate And Beneficial Arbitration Agreements And Does Not Advance Any Countervailing Federal Policy Concerning The Enforcement Of RICO

Unless it is reversed, the Eleventh Circuit's holding that parties to an arbitration agreement may not agree to waive all claims to multiple damages under RICO will have wide-ranging detrimental effects. While the costs of the decision are self-evident, we can discern no way in which the decision will advance the federal interests represented by the RICO statute.

First, the Eleventh Circuit's decision will create a gaping loophole in many existing arbitration agreements. Consistent with the broad judicial acceptance of private waivers of punitive damages, many businesses now include punitive damages waivers in their standard arbitration agreements. If the Eleventh Circuit's decision is affirmed, an aggrieved party seeking to avoid arbitration and escape its commitment to seek only compensatory damages will be given the incentive to cobble together a RICO claim. Experience has demonstrated that "litigants, lured by the prospect of treble damages and attorney's fees, have a strong incentive to invoke RICO's provisions." *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 504 (1985); see also Hon. William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 10 (1989) (noting large number of civil RICO cases filling the federal docket); Hon. Jed. S. Rakoff & Howard W. Goldstein, RICO:



CIVIL AND CRIMINAL LAW AND STRATEGY § 2.03, at 2-33 (1999) (referring to "substantial" rate of RICO filings, continuing at an average of eighty to ninety per month since 1986). To the extent that such claims have any colorable merit, there will be a shift away from arbitration to litigation. To the extent that such claims are frivolous, both judicial resources and the resources of defendants will be expended in weeding them out. This will substantially negate the efficiencies that the parties expected to gain when they entered into their arbitration agreements in the first place.

Second, the Eleventh Circuit's exception will create a disincentive for parties to enter into arbitration agreements at all. If punitive damages generally are waivable but RICO treble damages are not, the parties negotiating an arbitration agreement will realize that including a punitive damages waiver will lead to creative pleading by the aggrieved party to invoke RICO. For the reasons discussed above, many parties will not agree to arbitrate their disputes ***at all*** without a broad waiver of punitive damages. Because the arbitration agreement resulting from this dilemma may be no better than no agreement at all, parties are likely to opt for the latter.

On the other side of the scale, one searches in vain for a compelling federal interest that would justify preventing parties to an arbitration agreement from waiving a claim for multiple damages under RICO. First, Congress left the RICO treble-damages action in the control of private parties. Like the private antitrust claims that the court discussed in *Mitsubishi Motors*, "no citizen is under an obligation to bring [a RICO] suit," and "the private [RICO] plaintiff needs no executive or judicial approval before settling one." 473 U.S. at 636. Accordingly, no congressional purpose should be offended if a private citizen makes the judgment, *ex ante*, that its interests will be served by eschewing a RICO treble-damages action when arbitrating claims against its business associate. And, of course, the contracting parties will always remain free to enter arbitration agreements that expressly

permit the award of treble damages under RICO or that exempt RICO claims altogether from arbitration. See *id.* at 628 ("Nothing * * * prevents a party from excluding statutory claims from the scope of an agreement to arbitrate.").

Second, RICO has so departed from its original conception that a voluntary prospective waiver of treble damages against a contracting partner can scarcely be said to interfere with the intentions of the drafters. In *Shearson/American Express Inc.* v. *McMahon*, 482 U.S. 220 (1987), this Court noted that RICO's drafters, like the drafters of the antitrust statutes' treble-damages provision, "likewise sought to provide vigorous incentives for plaintiffs to pursue RICO claims that would advance society's fight against organized crime." *Id.* at 241; see also *Rotella* v. *Wood*, 528 U.S. 549, 558 (2000) ("[t]he provision for treble damages is * * * justified by the expected benefit of suppressing racketeering activity"). "[I]n its private civil version," however, "RICO [has evolved] into something quite different from the original conception of its enactors." *Sedima*, 473 U.S. at 500. The vast majority of civil actions under RICO are brought against legitimate businesses, not mobsters. As this Court said in *Shearson/American Express*, "[t]he special incentives necessary to encourage civil enforcement actions against organized crime do not support nonarbitrability of run-of-the-mill civil RICO claims brought against legitimate enterprises." 482 U.S. at 242. This observation compels the conclusion that the award of RICO treble damages is not necessary to vindicate the federal interest in enforcement of the RICO statute – especially when the case involves claims arising from a dispute between the parties to a contract that includes an arbitration clause.

Even if, contrary to all reasonable expectations, a widespread RICO conspiracy emerged that affected only individuals or entities who had signed arbitration agreements that barred suits against the wrongdoer for treble damages, the federal interest in the enforcement of RICO still would not



outweigh the importance of enforcing those arbitration clauses. If a strong message needed to be sent to particularly egregious wrongdoers, the government would have at its disposal the option of criminal prosecution, either under the RICO statute or under the laws criminalizing the predicate acts. Allowing a party to bring a civil suit in violation of its arbitration agreement instead — as the Eleventh Circuit did in this case — is an example of the remedy being worse than the disease.

### D. The Eleventh Circuit's Decision Has No Logical Stopping Point And Creates An Exception To The General Rule Favoring Arbitrability That Threatens To Swallow The Rule

As we discussed above, the Eleventh Circuit's decision undermines the right of contracting parties to set the terms of their arbitration agreements and the well-settled federal policy favoring arbitration without advancing any countervailing federal interest in litigating civil RICO claims. For these reasons alone, the decision warrants reversal by this Court. Even more troubling than the outcome of this particular case, however, is the wide-ranging applicability of the Eleventh Circuit's holding that threatens the future arbitrability of ***all*** statutory claims that provide for punitive or multiple damages.

The Eleventh Circuit adopted the reasoning of the district court (see Pet. App. 4a), which, in turn, based its order upon a prior Eleventh Circuit decision holding that a clause prohibiting extra-contractual damages rendered an agreement to arbitrate unenforceable ***in a Title VII action***. *Id.* at 30a-31a (citing *Paladino* v. *Avnet Computer Techs., Inc.*, 134 F.3d 1054 (11th Cir. 1998)). Noticeably absent from either court's opinion is any discussion of federal policy precluding waiver of the RICO treble-damages remedy. This omission, combined with the lower courts' reliance on a Title VII case, clearly indicates that the exception carved out by the district

court and countenanced by the Eleventh Circuit is not narrowly limited to RICO claims.

Without any language cabining its holding, the Eleventh Circuit's decision has no logical stopping point. There is no good reason why the district court's conclusion (incorporated by reference by the Eleventh Circuit) that "the limitation on punitive or exemplary damages serves as a limitation on the statutory claims that may be adjudicated before an arbitrator" (Pet. App. 31a) cannot also render non-arbitrable claims brought under a host of federal statutes that provide for treble damages, such as the Clayton Act and the Lanham Act, or punitive damages, such as Title VII and the ADA. For that matter, there is no good reason why this holding would not also preclude arbitration of claims brought under state deceptive trade and consumer fraud statutes that provide for multiple damages or punitive damages. In light of how often these types of claims are raised in civil litigation (see generally Anthony Paul Dunbar, *Consumer Protection: The Practical Effectiveness of State Deceptive Trade Practices Legislation*, 59 TUL. L. REV. 427 (1984)), there is a grave risk that the Eleventh Circuit's exception to the general rule favoring arbitration, if left uncorrected, will eventually swallow that rule. That outcome would be wholly inconsistent with decades of pronouncements by this Court that arbitration is to be encouraged, not thwarted.

## CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.



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# IN THE
# Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., *et al.*

*Petitioners,*

v.

JEFFREY BOOK, D.O., *et al.*

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether the Federal Arbitration Act, 9 U.S.C. §§ 1-16, requires federal and state courts to enforce arbitration clauses that expressly prohibit arbitrators from awarding statutory remedies to plaintiffs.

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## INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") submits this brief as *amicus curiae* in support of Respondents, urging the Court to hold that federal law empowers courts, not arbitrators, to decide whether an arbitration clause that prohibits arbitrators from awarding statutory remedies is legal and enforceable.

TLPJ is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation. In prosecuting cases throughout the federal and state courts, TLPJ seeks to advance consumers' and victims' rights, environmental protection, civil rights and civil liberties, workers' rights and workplace safety, the preservation and improvement of the civil justice system, and the protection of the poor and the powerless. Based on these goals, TLPJ has become concerned about a recent trend wherein some businesses are imposing abusive mandatory arbitration systems against their customers and individual employees as a means to evade liability for wrongdoing to these parties.

Five years ago, TLPJ established a Mandatory Arbitration Abuse Prevention Project to combat these abuses. During this time, we have been contacted repeatedly by consumers and workers, and by their lawyers, who wished to pursue claims through the civil justice system and have their cases heard by a jury of their peers, but could not do so because of mandatory arbitration systems imposed by businesses. While TLPJ supports alternative dispute resolution when it is truly consensual between the parties, our research and investigation have convinced us that businesses very often impose binding arbitration requirements against consumers, workers, and other parties as a mandatory condition for entering into certain types of economic transactions. We recognize that these mandatory arbitration clauses are usually enforceable under general principles of contract law. In a smaller number of cases,

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), letters of consent to file this brief from Petitioners and Respondents have been filed with the Clerk of the Court.

however, we have seen corporations abuse their advantages in bargaining power and commercial sophistication by imposing restrictive arbitration schemes that strip claimants of remedies or create other barriers to a claimant's vindication of his or her statutory rights. Through its Mandatory Arbitration Abuse Prevention Project, TLPJ has devoted considerable time and effort to representing parties in fighting these corporate abuses of the power to compel arbitration.

The question presented is whether the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16, requires a court or an arbitrator to determine whether an arbitration clause that prohibits arbitrators from awarding extra-contractual or punitive damages is illegal and unenforceable. TLPJ has a strong interest in the resolution of this question because pre-arbitration *judicial* review of the legality of arbitration clauses has long been critical in preventing corporations from using their control over forum selection under the FAA to take away statutory remedies from consumers and workers.

The corporations that engage in these abuses typically defend their restrictive arbitration schemes by invoking the FAA and the seemingly boundless "liberal" or "emphatic federal policy in favor of arbitral dispute resolution." *See* Petitioners' Brief at 8-9 and 20, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 and 631 (1985). These corporations claim that the FAA allows them not only to keep claimants out of court, but also to diminish or eliminate altogether a claimant's access to statutory remedies. We believe that these efforts are misguided in that they seek to transform the FAA's endorsement of contractual forum selection into a license for "do it yourself civil justice reform."[2] We also believe that these efforts, if left unchecked by the Court, could undermine many federal and state laws that were enacted to protect consumers, workers, and other individuals against abuses of corporate power.

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[2] *See* Interview, "Do An LRA: Implement Your Own Civil Justice Reform Program NOW," The Metropolitan Corporate Counsel at 30 (Aug. 2001) (interview with Managing Director of the National Arbitration Forum, an ostensibly neutral arbitration service provider).



## STATEMENT OF CASE

Respondents, a group of doctors, filed suit on behalf of themselves and others similarly situated alleging that several Health Maintenance Organizations' ("HMOs'") automated claims processing systems deprived them of payments they were owed for services performed. The Federal Judicial Panel on Multi-District Litigation consolidated the cases and transferred them to the United States District Court for the Southern District of Florida. Respondents then filed an amended complaint, asserting state contract law claims and claims under state and federal statutes, including the Racketeer Influenced and Corrupt Organizations Act ("RICO), 18 U.S.C. §§ 1961 *et seq*.

In response to the amended complaint, Petitioners and other defendant HMOs moved to compel arbitration of Respondents' claims based on arbitration clauses in various of the HMOs' contracts with individual doctors. Several of these arbitration clauses contain exculpatory provisions limiting the authority of arbitrators to hear certain claims or to award specific types of relief to Respondents and other claimants. For example, one of the arbitration clauses used by Petitioners UnitedHealthcare, Inc. and UnitedHealth Group Incorporated (collectively, "United") provides that "arbitrators . . . *shall have no authority to award extra contractual damages of any kind, including punitive or exemplary damages*, and shall be bound by controlling law." (J.A. 168) (emphasis added). This arbitration clause further provides that "in no event may arbitration be initiated more than one year following the sending of written notice of the dispute." (J.A. 168).[3] The clause also expressly prohibits the arbitrators from disregarding these limitations on their authority, even if they conclude that the limitations are unlawful: "The arbitrators may construe or

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[3] The statutory limitations period for Respondents' RICO claims ordinarily would be four years. *See Agency Holding Corp. v. Malley-Duff Associates, Inc.*, 483 U.S. 143, 156 (1987).

interpret but shall not vary or ignore the terms of this Agreement[.]" (J.A. 168).[4]

Petitioners PacifiCare Health Systems, Inc. and PacifiCare Operations, Inc. (collectively, "PacifiCare") imposed similar arbitration clauses providing that an "arbitrator shall have the power to grant all legal and equitable remedies and award compensatory damages provided by [state] law, *but shall not have the power to award punitive damages*." (J.A. 84, 106-07, 146-47) (emphasis added). One of PacifiCare's arbitration clauses also declares that "the courts shall not have the authority to review or grant any request or demand for damages." (J.A. 147).

The district court issued a comprehensive opinion granting Petitioners' and the other HMOs' motions to compel arbitration in part and denying the motions in part. The court examined the claims by different plaintiffs against different defendants and ordered arbitration of claims between contracting parties wherever there was an enforceable arbitration clause. For example, the court ordered arbitration of claims against defendant WellPoint Health Networks, Inc. ("WellPoint") after concluding that a plaintiff's contract with WellPoint contained an arbitration clause and that the clause imposed no impediment to the plaintiff's access to statutory remedies. *See In re Managed Care Litigation*, 132 F. Supp. 2d 989, 1002-03 (S.D. Fla. 2000). The court similarly ordered arbitration of claims by contracting plaintiffs against defendants Foundation Health Systems, Inc. ("Foundation"), Prudential Insurance Company of America ("Prudential"), and CIGNA Corporation ("CIGNA"). *Id.* at 1001-05. With regard to claims against Foundation, the court observed that one of Foundation's arbitration clauses impermissibly shortened the limitations period for filing claims to six months and prohibited awards of punitive damages, but nevertheless ordered arbitration of all

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[4] Another of United's arbitration clauses likewise provides that "arbitrators. . .shall have no authority to award any punitive or exemplary damages," and includes identical provisions imposing a one-year filing requirement and prohibiting arbitrators from varying or ignoring the terms of the agreement. (J.A. 212).



covered claims because two other applicable arbitration clauses did not contain these infirmities. *Id.* at 1001-02.

The district court also granted in part and denied in part the motions by Petitioners United and PacifiCare to compel arbitration. With regard to claims against United, the court found that the provisions of United's arbitration clause prohibiting awards of extra-contractual damages and imposing a one-year limitations period would raise "grave concerns that Dr. Porth's statutory claims will not be adjudicated properly in an arbitration forum." *Id.* at 1000. The court held that Respondents' statutory claims against United could not be subject to arbitration because of these remedial limitations, but also held that Respondents' contract claims were subject to arbitration because the damages restriction would not apply and the abridged limitations period alone was not sufficient to prevent enforcement. *Id.* at 1001. With regard to claims against PacifiCare, the court held that all covered contractual and non-RICO statutory claims must be arbitrated, but that Respondents' RICO claims would not be subject to arbitration because PacifiCare's arbitration clause prohibited arbitrators from awarding punitive damages that were available to Respondents under the Act. *Id.* at 1005.

The Eleventh Circuit affirmed the district court's opinion in its entirety. The court of appeals described the district court's holdings regarding Petitioners' arbitration clauses and their restrictions on the remedies available to Respondents, then affirmed these holdings for the reasons given by the district court without further comment. *See In re Humana Inc. Managed Care Litigation*, 285 F.3d 971, 973-74 (11th Cir. 2002).

## SUMMARY OF ARGUMENT

The courts below correctly found that the FAA empowers courts to determine whether arbitration clauses that prohibit arbitrators from awarding statutory remedies to claimants are illegal and unenforceable in particular cases. This Court's decisions interpreting and applying the FAA establish both that arbitration clauses should not be enforced where they would deprive claimants of statutory remedies, and that courts—not arbitrators—are the proper authority to make this determination.

First, an arbitration clause (like any other contract) must form a legal and valid agreement in order to be enforced. The question of whether an arbitration clause violates federal or state statutes is decisive as to whether the clause is enforceable. This Court has held repeatedly that parties must have the same statutory remedies in arbitration that they would have in court. In light of this baseline requirement, the Court has also made clear that an arbitration clause should not be enforced if it would operate to deny statutory remedies to a party. *See, e.g., Mitsubishi*, 473 U.S. at 637 n.19. Thus, to the extent that terms of Petitioners' arbitration clauses prohibiting awards of extra-contractual or punitive damages are contrary to federal or state law, these restrictions would support a determination that the clauses are illegal and unenforceable.[5]

Second, courts—not arbitrators—must make these determinations. This Court has held that questions of arbitrability concerning whether or not parties are bound by an

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[5] A necessary part of the holdings below was that the prohibitions on extra-contractual and punitive damages in Petitioners' arbitration clauses would take away statutory remedies that Respondents are seeking in their RICO claims. *Amicus* does not address herein whether RICO's damages remedies are properly characterized as "extra-contractual" or "punitive" in nature, or whether these remedies can ever be waived by contract. Rather, this brief focuses on the question of who should decide the threshold inquiry as to the legality of the arbitration agreement. Accordingly, the brief proceeds on the assumption that the terms of the arbitration clause do, in fact, restrict an arbitrator's authority to award statutory remedies.



enforceable agreement to arbitrate are for courts to decide under the FAA. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 592 (2002). A court is the *only* body that can make the determinations required here because an arbitrator could never disregard contractual restrictions on his or her own authority. As this Court has often recognized, arbitration under the FAA is strictly a matter of contract. Accordingly, the terms of an arbitration clause define the outer bounds of a party's duty to arbitrate and of an arbitrator's authority to award relief. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[arbitration] is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.") Since any arbitrators would be bound by the terms of Petitioners' arbitration clauses prohibiting them from awarding extra-contractual or punitive damages, only a court could ever make the determination that these restrictions are illegal and unenforceable, and then proceed to award such remedies as may be provided by statute.

Consistent with these principles, numerous federal and state courts have rejected corporate attempts to rely on the FAA and the "liberal federal policy favoring arbitration" as bases for eliminating or diminishing claimants' access to statutory remedies. These courts have prevented corporations from distorting the FAA's underlying purposes by erasing the critical distinction between contractual *forum selection* and contractual *exculpation*. The FAA allows parties to contract to resolve disputes in a forum outside of court, but it does not allow corporations to take away from individuals the substantive legal protections that are secured by federal and state statutes. In light of the critical role that courts have played in countering corporate abuses of the opportunity for arbitration, the Court should hold that the FAA empowers courts—not arbitrators—to determine whether arbitration clauses that restrict a party's access to statutory remedies are legal and enforceable.

## ARGUMENT

### The FAA Empowers Courts—Not Arbitrators—to Invalidate Arbitration Clauses That Prohibit Arbitrators from Awarding Statutory Remedies to Claimants.

#### A. Arbitration Clauses Must Allow Parties to Seek the Same Statutory Remedies They Could Recover in Court.

The FAA's policy goals concerning contractual forum selection do not allow corporations to take away federal and state statutory remedies from individual claimants. To the contrary, this Court has many times interpreted the FAA to permit private arbitration of statutory claims on the theory that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi*, 473 U.S. at 628.[6] In light of this baseline presumption that arbitration is just another forum, the Court has rejected "generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.'" *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89-90 (2000) (quoting *Rodriguez de Quijas*, 490 U.S. at 481). The FAA therefore provides no support for Petitioners to use their arbitration clauses to take away statutory remedies from Respondents and other claimants.

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[6] *See also Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279, 296 n.10 (2002) (quoting *Mitsubishi*); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (same); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (same).



The issue presented here is not whether arbitration *generally* prevents parties from vindicating statutory rights, but whether the *particular terms* of Petitioners' arbitration clauses would prevent Respondents from vindicating statutory claims that they have in this case.[7] Petitioners mistakenly assume that the FAA allows them to enforce exculpatory provisions in an arbitration clause that would rewrite the statutes that provide substantive remedies for claimants. In fact, this Court's decisions go a long way towards prohibiting this practice. The Court has repeatedly held that a party's ability to effectively vindicate his or her statutory rights is a threshold requirement for enforcement of an arbitration clause that purports to cover statutory claims: "[S]o long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637.[8]

The Court thus has declared that it would strike down any arbitration clause that purports to waive a party's statutory

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[7] The proposition that this is a case-specific challenge to *Petitioners'* arbitration clauses, not a generalized attack on all arbitration, finds further support from evidence showing that most consumer arbitration clauses do not, in fact, contain such remedy-stripping provisions. Counsel for *amicus* have published a comprehensive manual on consumer arbitration law that includes an appendix compiling 160 arbitration clauses used by corporations in consumer transactions. The vast majority of these clauses do not attempt to limit the legal remedies available to consumers. *See* F. PAUL BLAND, JR. ET. AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS (2d ed. 2002) (CD-Rom Link entitled "Arbitration Agreements").

[8] *See also Randolph*, 531 U.S. at 90 (quoting *Mitsubishi*); *Gilmer*, 500 U.S. at 28 (same).

rights: "[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, *we would have little hesitation in condemning the agreement as against public policy*." *Id.* at 637 n.19 (emphasis added). The Court recently reiterated this declaration, rejecting a lower court's holding that an arbitration clause prospectively waived an employee's statutory right to seek relief through the EEOC:

> To the extent the Court of Appeals construed an employee's agreement to submit his claims to an arbitral forum as a waiver of the substantive statutory prerogative of the EEOC to enforce those claims for whatever relief and in whatever forum the EEOC sees fit, the court obscured this crucial distinction [between forum selection and exculpation] and ran afoul of our precedent.

*EEOC v. Waffle House*, 534 U.S. at 295 n.10.

These decisions demonstrate that the FAA does not bind claimants to arbitration clauses that would strip them of the statutory remedies they could claim in court. Instead, these types of restrictions establish a basis for courts to strike down the clauses as illegal and against public policy under the statutes giving rise to claims in particular cases.

### B. Only Courts Can Decide Questions Concerning the Legality of Contractual Restrictions on an Arbitrator's Authority.

Courts must decide whether an arbitration clause is legal and enforceable, just as they must decide any other question relating to whether parties are bound by an agreement to



arbitrate. The FAA's text and more than three decades of precedent applying the Act demonstrate that arbitration is strictly a matter of contract and that parties cannot be forced to arbitrate claims where there is no enforceable agreement for them to do so. The FAA provides that written arbitration agreements shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Act further states that a federal court may order a party to arbitrate only "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue." 9 U.S.C. § 4. Consistent with these provisions, the Court has held that issues going to the making of an agreement to arbitrate must be decided by courts, not arbitrators, because the FAA "makes arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 and 404 n.12 (1967) (emphasis added).

The Court's recent decision in *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002), reiterates that courts must decide such threshold or "gateway" questions as whether parties are bound by a legal and enforceable arbitration agreement. In *Howsam*, the Court held that an arbitrator, not a court, should apply an arbitration service's rule giving parties six years to submit claims to arbitration because satisfaction of this limitations period "seems an aspect of the controversy which called the grievance procedures into play," such that parties would expect an arbitrator to decide the issue. *Id.* at 593 (citation omitted). *Howsam* was careful to distinguish, however, between this type of merits-based question involving *application* of a contractual limitations period whose legality was not disputed, and the types of questions at issue here. Regarding the latter, the Court concluded that: "[A] gateway dispute about whether the parties are bound by a given

arbitration clause raises a 'question of arbitrability' for a court to decide." *Id.* at 592 (citing *First Options*, 514 U.S. at 943-46; *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964)). Respondents are raising arbitrability questions here because their challenge to the legality of contractual restrictions on the arbitrators' authority to award statutory damages goes to whether or not they are bound by these arbitration clauses.[9]

While a court's power to decide arbitrability questions is well-established, an arbitrator could never resolve the arbitrability disputes at issue here. Respondents are challenging the legality of Petitioners' arbitration clauses based on the restrictions they place on the authority of arbitrators themselves to award extra-contractual or punitive damages. An arbitrator has no power to set aside or ignore contractual restrictions on his or her own authority because, as this Court has recognized, "arbitration is strictly a matter of contract between the parties; it is a way to resolve those disputes, *but only those disputes*—that the parties have agreed to submit to arbitration." *First Options*, 514 U.S. at 943. Thus, under the FAA, only courts can determine the legality of contractual restrictions on an arbitrator's authority to award statutory remedies.

A court's power to address the lawfulness of contractual restrictions on an arbitrator's authority to award statutory

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[9] Petitioners erroneously claim that a court's ruling on the lawfulness of contractual restrictions on an arbitrator's authority would "usurp the arbitrator's role in performing the merits review." (Brief at 25.) The courts below did not award extra-contractual or punitive damages to Respondents, nor did they examine any evidence that would support such awards. Instead, the courts focused solely on whether Respondents were bound by arbitration clauses that limited arbitrators' authority to award them statutory remedies. *Howsam* clearly reserves these questions for courts.



remedies is perfectly consistent with federal arbitration policy. Petitioners assert that "[a]llowing district courts to evaluate such provisions in the first instance not only usurps the role of the arbitrator, but also exhibits a strong distrust of the arbitral process. . ." (Brief at 6-7). To the contrary, the call for a court to invalidate these restrictions is a challenge not to the *competence* of arbitrators, but to the *authority* of arbitrators in light of the contractual restrictions that Petitioners imposed on them. *Cf. Mitsubishi*, 473 U.S. at 626-27 ("we are well past the time when judicial suspicion of the . . . competence of arbitration tribunals inhibited the development of arbitration as an alternative means of dispute resolution.")

The only parties that showed "suspicion" or "distrust" towards arbitrators in this case were *Petitioners* themselves by drafting their arbitration clauses to prohibit arbitrators from awarding the statutory damages remedies that Respondents could recover in court. If Petitioners truly wanted the "efficiency and cost-effectiveness that were part of the arbitration bargain" (Brief at 20), rather than the chance to strip Respondents of statutory remedies, they could easily have drafted an arbitration clause that did not disturb an arbitrator's authority to award those remedies. Their failure to do so should not be rewarded through an unwarranted reinterpretation of the FAA and its policies regarding contractual forum selection.

Petitioners' arguments relying on federal arbitration policy to overcome the terms of their own arbitration clauses are analogous to arguments that the Court rejected in *Waffle House*. The question presented in *Waffle House* was whether the EEOC's discrimination claims filed on behalf of an individual employee were subject to arbitration under the defendant employer's arbitration clause that the employee had signed. *Waffle House*, 534 U.S. at 282. The defendants and the

lower court sought to compel arbitration of these claims by balancing the policy goals of the FAA and the statute giving rise to the EEOC's claims, without regard to whether the agency was ever bound by the defendant's arbitration clause. *Id.* at 293. This Court squarely rejected that argument, holding instead that "we look first to whether the parties agreed to arbitrate a dispute, not to general policy goals, to determine the scope of the agreement," and that "we do not override the clear intent of the parties, or reach a result inconsistent with the plain text of the contract, simply because the policy favoring arbitration is implicated." *Id.* at 294. In light of *Waffle House's* holding, federal arbitration policy provides no support for Petitioners' attempt to compel arbitration regarding the availability of statutory remedies that their arbitration clauses expressly prohibit arbitrators from awarding.

Finally, Petitioners argue that questions relating to contractual restrictions on an arbitrator's authority can be arbitrated because they will later be subject to post-arbitration review by courts. (Petitioners' Brief at 23-24). In fact, the FAA's provisions concerning judicial review of arbitral awards do not transfer from a court to an arbitrator the power to decide "in the first instance" whether restrictions on the arbitrator's authority to award statutory remedies are illegal and unenforceable. Instead, these provisions further demonstrate that arbitrators would be *prohibited* from disregarding contractual restrictions on their authority to award statutory remedies to Respondents and other claimants.

The FAA enumerates specific grounds on which federal courts may confirm, vacate, or modify an arbitrator's award to a party. *See* 9 U.S.C. §§ 9-11. The grounds for judicial vacature listed in Section 10 are limited to situations where an arbitration award was procured by fraud or undue means, there



was evident partiality or corruption by an arbitrator, an arbitrator's misconduct caused prejudice to a party, or where "*the arbitrators exceeded their powers.*" 9 U.S.C. § 10(a) (emphasis added). Thus, instead of ensuring that Respondents' statutory rights would be protected, the FAA's post-arbitration review provisions guarantee that any arbitrators' award of extra-contractual or punitive damages would be subject to automatic vacature under Section 10(a)(4) for exceeding the powers granted to the arbitrators under Petitioners' arbitration clauses.

While a court would be obligated to vacate any arbitral award of extra-contractual or punitive damages because of the restrictive terms of Petitioners' arbitration clauses, it is doubtful that a court could protect Respondents' statutory rights by vacating an arbitrator's decision *enforcing* these restrictions. Courts have sometimes recognized a form of merits-based review of an arbitrator's award where there is a "manifest disregard of the law," *First Options*, 514 U.S. at 942 (citation omitted), but the typical formulation of this review makes clear that it is "severely limited," requiring a court to find that "the arbitrators knew of a governing legal principle yet refused to apply it," and that the law the arbitrator ignored was "well defined, explict, and clearly applicable to the case." *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998). Indeed, this Court has held in the related context of review of a labor arbitrator's award that "[c]ourts are *not* authorized to review the arbitrator's decision on the merits . . . ," so that "improvident, even silly, factfinding does not provide a basis for a reviewing court to enforce the award." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (citation omitted) (emphasis added). Absent any clear authority for a court to protect a party's right to seek punitive damages at the post-arbitration review stage, Petitioners' argument for an arbitrator's decision on this question "in the first instance"

would let these restrictive arbitration clauses trump Respondents' statutory rights in the first *and last* instances.[10]

Since only courts have authority under the FAA to overrule illegal terms in an arbitration clause, the two lower courts correctly found that disputes over the lawfulness of restrictions on an arbitrator's authority to award statutory remedies are matters for judicial, not arbitral, resolution.

### C. Lower Court Case Law Demonstrates that Pre-Arbitration Judicial Review Is Critical to Ensuring Fairness in Dispute Resolution Between Corporations and Individuals.

The power of courts to strike down arbitration clauses that restrict a party's statutory remedies has been of enormous significance in combating some of the worst abuses carried out under the banner of the FAA and federal arbitration policy. Although federal and state courts across the country routinely enforce valid arbitration clauses, a number of courts have refused to enforce particular clauses whose express terms would prevent parties from effectively vindicating their statutory rights in arbitration. A survey of these cases demonstrates that courts

[10] The use of post-arbitration review for deciding the legality of restrictions on an arbitrator's authority to award relief is not only unsupported by authority, but it also would thwart the goals of "efficiency and cost-effectiveness" (Brief at 20) trumpeted by Petitioners. Under this system, a party facing such restrictions would have to go through arbitration under the restrictive terms, then obtain a judicial ruling striking down the restrictions, and then go back to arbitration for further proceedings involving new evidence related to the previously prohibited claims. By contrast, where courts make the initial determination, parties can then proceed on the merits of their claims with a clear understanding as to the decision-maker's authority to award relief.



play a critical role in preventing the parties that draft these clauses from abusing their right to private dispute resolution under the FAA.

A number of these cases involve arbitration clauses that, like those at issue here, attempt to strip parties of substantive rights by imposing restrictions on the arbitrators' authority to award relief. In *Carll v. Terminix Int'l Co.*, 793 A.2d 921 (Pa. Super. Ct. 2002), for example, the plaintiffs were a married couple and their four children who claimed that they had suffered "numerous severe and permanent injuries as a result of [Terminix's] negligent application of pesticides in and around their home." *Id.* at 922. The defendant moved for arbitration under a clause providing that "the arbitrator shall not have the power or authority to hold Terminix responsible for . . . direct indirect, special, incidental, consequential, exemplary or punitive damages." *Id.* Against the backdrop of generally applicable state law involving exculpatory contracts, the court had little difficulty in finding that this arbitration clause was counter to law and refused to enforce it. *Id.* at 925.[11] Yet, under Petitioners' and their *amici's* approach, these injury victims would have been forced into arbitration to find out what remedies they might claim from a decision-maker who was contractually barred from awarding the only relief they sought.

[11] Similarly, in *Parrett v. City of Connersville, Ind.*, 737 F.2d 690, 697 (7th Cir. 1984) (Posner, J.), the Court was faced with an arbitration system that did not permit the arbitrator to award the full common law damages that a plaintiff might suffer, and that did not permit the arbitrator to prevent harm to a constructively discharged plaintiff before it occurred. The Seventh Circuit held that, in light of these sharp limitations, the arbitration system established by a City for claims by police officers offended due process.

Another type of challenge that has required judicial intervention involves arbitration clauses imposing "Loser Pays" rules that force any individual consumer who does not prevail on claims against a business to pay the attorneys' fees of the defendant. While most arbitration clauses do not impose this type of rule, at least one national arbitration service has boasted in communications to in-house counsel for corporations that it applies such a rule to consumer claims with the goal of making it more risky for individuals to bring claims against businesses. *See* Interview, "*Do an LRA: Implement Your Own Civil Justice Reform Program NOW*," The Metropolitan Corporate Counsel at 30 (Aug. 2001) (quoting Managing Director of the National Arbitration Forum). A "Loser Pays" rule is fundamentally at odds with the attorneys' fees provisions set forth in nearly every civil rights and consumer protection statute in effect in the United States.[12] This Court has enunciated the simple and sensible reason for this rule: Requiring individuals to pay a defendant's attorneys' fees merely because they do not prevail would discourage plaintiffs from seeking protection of the law. "To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978).

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[12] These statutes typically provide that a prevailing plaintiff shall recover her or his attorneys' fees, but a defendant shall only recover attorneys' fees if the plaintiffs' claims were frivolous. *See* Alba Conte, 1 *Attorney Fee Awards* § 5.01 at 266 n. 1 (1993) (statutes providing attorneys' fees only to prevailing plaintiffs include TILA, the Consumer Credit Protection Act, the Fair Debt Collection Practices Act, the Consumer Product Safety Act, ERISA, the Clayton Act, and the Equal Credit Opportunity Act).



Currently, the validity of such "Loser Pays" provisions under federal and state law is evaluated by courts, and at least one court has held that these requirements are substantively unconscionable as a matter of state contract law. *See Sosa v. Paulos,* 924 P.2d 357, 362 (Utah 1996) (arbitration clause requiring medical malpractice plaintiff to pay litigation costs of doctor if patient "wins less than half the amount of damages sought in arbitration" held unconscionable). Under Petitioners' and their *amici's* approach, parties would have to arbitrate before a service that publicly endorses "Loser Pays" rules in order to obtain a determination as to whether these rules are legal and enforceable. Only courts can ensure that corporations and their allies do not use such practices to prevent individuals from enforcing their statutory rights.

Still another issue demonstrating the need for judicial involvement at the outset involves the costs of some arbitration systems. This Court held that an arbitration clause should not be enforced where it is proven that the clause would impose prohibitive costs that would prevent parties from vindicating their statutory rights. *Green Tree v. Randolph*, 531 U.S. at 90. While arbitration may often be cheaper than litigation, there have been several cases where courts found based on record evidence that the costs of particular arbitration systems would prevent individual consumers or employees from effectively vindicating their statutory rights.

In *Camacho v. Holiday Homes, Inc.*, 167 F. Supp. 2d 892 (W.D. Va. 2001), for example, the parties stipulated that the arbitrators' filing fees and "case" fees for a consumer case would amount to $2,000. The parties further stipulated that, although the consumer could "apply for fee deferral or reduction due to 'extreme hardship,' . . . that waiver of fees is extremely rare in practice." Beyond those fees, the parties

stipulated that the plaintiff would have been required to pay arbitrators' fees of between $600 and $4,100. *Id.* at 896-97. After examining the limited financial means of this plaintiff (who was allowed to proceed in court *in forma pauperis*), the court concluded that the arbitration clause would prohibit her from effectively vindicating her statutory rights, and therefore was unenforceable. *Id.*

Similarly, in *Popovich v. McDonald's Corp.*, 189 F. Supp. 2d 772 (N.D. Ill. 2002), a consumer bringing claims alleging deceptive business practices produced record evidence establishing the arbitration costs he faced. This unrefuted evidence obtained from a certified arbitrator showed that the rules used for the case would require the consumer to bear costs "likely to be as much as $48,000 and perhaps as high as $126,000." *Id.* at 778. The court found based on this evidence that "the costs of arbitration are likely to be staggering." *Id.* It was undisputed that these costs would be prohibitive for the plaintiff. *Id.* Accordingly, the court held that the arbitration clause was unconscionable. Several other courts have reached the same or similar conclusions.[13]

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[13] *See, e.g., Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002) (appeal pending) (finding that prohibitive arbitration fees would bar many consumers from effectively vindicating their rights based in part on record evidence obtained from the American Arbitration Association ("AAA") showing that: "A random sampling compiled by an AAA Vice President of 82 arbitrators on the AAA Commercial Panel in Northern California provides the following compensation information: (a) arbitrator compensation ranges from $600 to $3,850 per day; (b) the average (mean) daily rate of arbitrator compensation is $1,899; c) the median daily rate of arbitrator compensation is $1,750."); *Brower v. Gateway 2000*, 676 N.Y.S.2d 569, 571 and 574 (N.Y. App. Div. 1998) (arbitration clause required customers to pay advance fee of $4,000 (exceeding the cost of most of the defendant's products), half of which "was nonrefundable even if the consumer prevailed at the arbitration;" court held that "the excessive cost factor that is necessarily entailed in arbitrating before the ICC is unreasonable and surely serves to deter the individual consumer from invoking the process."); *Matter of Arbitration Between Teleserve Sys., Inc. and MCI Telecomm. Corp.*, 659 N.Y.S.2d 659, 660, 664 (N.Y. App. Div. 1997) (the arbitration filing fee alone for the claimant in an antitrust dispute would amount to more than $200,000, which would have "[t]he practical effect" of barring the plaintiff from pursuing its claims).



Under Petitioners' and their *amici's* approach, an individual claimant would be forced to surmount these barriers in order to obtain an arbitrator's determination "in the first instance" as to whether the arbitrators' own fees were so high as to be prohibitive, and therefore illegal or unconscionable. It goes almost without saying that few, if any, arbitrators are likely to declare that their own income is so excessive as to be illegal. In any case, such an approach plainly violates the bedrock principle of fairness that "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

Along the same lines, several courts have addressed challenges to arbitration agreements that required parties to travel long distances to pursue their claims in arbitration. In one notorious case, a state court of appeals held unconscionable a sub-prime lender's adhesion contract requiring California borrowers to travel all the way to Minnesota to pursue small consumer claims. *See Patterson v. ITT Consumer Fin. Corp.*, 18 Cal. Rptr. 2d 563 (Cal. Ct. App. 1993).[14] Under Petitioners' and their *amici's* approach, these low-income borrowers would

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[14] *See also Philyaw v. Platinum Enters.*, 2001 Va. Cir. LEXIS 10, at *6-*7 (Va. Cir. Ct. Jan. 9, 2001) ("Common sense dictates that retail purchasers such as the Philyaws could not afford the time and expense to go to Los Angeles to arbitrate a claim arising from a used car sale in Virginia.")

have to travel halfway across the country to obtain an arbitrator's ruling as to whether this travel requirement is itself illegal and unenforceable. This would effectively leave consumers with no remedy for such an abusive arbitration clause, *and therefore no remedy for their underlying claims*, because the costs of such travel would usually be prohibitive.[15]

Finally, in cases involving perhaps the most serious abuses of private arbitration, courts have addressed challenges to arbitration clauses that were designed to ensure that the arbitrators would favor the employer or corporation that drafted the clause over an individual claimant in a dispute. In *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999), for example, the Fourth Circuit refused to compel arbitration in a case arising out of an employee's sex discrimination claims,

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[15] The arbitration service in *Patterson*, the National Arbitration Forum ("NAF"), would have been particularly unlikely to hold that its own rules were unconscionable in favoring ITT. Evidence submitted in the record in *Toppings v. Meritech Mortgage Serv's, Inc.*, 569 S.E.2d 149 (W.Va. 2002), established that the General Counsel of the NAF had left ITT Financial, where he had been a lawyer with some responsibility for defending consumer cases, shortly before *Patterson* was decided. Indeed, requiring consumers with small claims to travel across the country is pefectly consistent with NAF's promises in a periodical aimed at defense counsel to provide a system of handling consumer claims whose economics are "entirely different" from court, because the arbitral forum will ensure that it is not "cost-free" for consumers to bring claims against businesses. *Do an LRA: Implement Your Own Civil Justice Reform Program NOW*, Metropolitan Corp. Couns., Aug. 2001; *cf.* Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, Wash. Post, Mar. 1, 2000 (discovery in a case in Alabama demonstrated that in 19,618 cases between a lender and its customers that were arbitrated before NAF , the lender had prevailed in all but 87 of the cases, a success rate of 99.6%.) Only after *Patterson* held that the requirement of traveling to Minnesota was unconscionable did NAF re-write its rules to permit consumers to bring cases in an accessible location.



where an employer's arbitration rules were "crafted to ensure a biased decision-maker." *Id.* at 938. Noting that the employer retained complete control over the selection of two of the three arbitrators on a panel, to the point where *even the company's own managers* could serve as arbitrators, the court found that "the selection of an impartial decisionmaker would be a surprising result." *Id.* at 939. Accordingly, the court refused to enforce the arbitration clause, holding that the employer had created "a sham system unworthy even of the name of arbitration." *Id.* at 940.[16]

Under Petitioners' and their *amici's* approach, however, the arbitrators named under this "sham" selection system would have had the primary authority to pass on the legality of the system itself. This would have required the plaintiff to go all the way through arbitration with these hand-picked arbitrators before she could ever obtain a court's determination as to whether this system is inherently unfair in preventing her from vindicating her Title VII claims. Since courts have consistently acted "in the first instance" to ensure that arbitration clauses provide individual claimants with neutral decision-makers, the removal of courts from this equation would be an invitation for enormous abuse.

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[16] *See also Murray v. United Food and Commercial Workers Int'l Union*, 289 F.3d 297, 303-04 (4th Cir. 2002) (holding arbitration clause unconscionable for giving employer complete control over list of eligible arbitrators and for arguably prohibiting arbitrators from contravening employer's right to terminate employees; finding that clause was one "under which the prospective litigant cannot effectively vindicate the statutory cause of action"); *Ditto v. Re/Max Preferred Properties, Inc.*, 861 P.2d 1000 (Okla. Ct. App. 1993) (refusing to enforce arbitration clause giving one party control over selection of arbitrator).

The Court should affirm the decisions below and hold that courts have exclusive authority under the FAA to determine the legality of arbitration clauses whose terms would prevent parties from effectively vindicating their statutory rights. A contrary ruling would risk transforming the FAA from a statute sanctioning contractual forum selection into a vehicle for undermining the federal and state laws that protect consumers, workers, and other parties against abuses of corporate power.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In The

# Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., ET AL.,

*Petitioners,*

v.

JEFFREY BOOK, D.O., ET AL.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## INTEREST OF *AMICUS CURIAE*

The National Association of Consumer Advocates ("NACA") is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors and law students whose primary practice involves the protection and representation of consumers.[1] Its mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. Consistent with its goal of promoting justice for consumers, NACA has appeared as *amicus curiae* before a number of federal and state appellate courts including appearing as *amicus curiae* before the United States Supreme Court in *Heintz v. Jenkins*, 514 U.S 291 (1995), in support of the consumer's contention, adopted by the Court unanimously. It has also advocated the interests of consumers in the areas of home ownership, automobile lemon laundering and consumer credit before federal administrative agencies.

NACA submits this brief in order to address arguments not fully made in the parties' briefs and to discuss the issues before the Court in light of their impact upon consumers.

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[1] Both Petitioners and Respondents have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, NACA states that no counsel for any party authored this brief in whole or in part and that no person other than NACA, its counsel, and its members contributed monetarily to the preparation or submission of this brief.

NACA is concerned that some arbitration providers have conceived and implemented arbitration procedures without adequately taking the special nature of consumer transactions into account, with the result that these procedures sometimes deprive consumers of meaningful opportunities to present their claims. NACA wishes to assist the Court in making a decision that will enable all participants in arbitrations to have a meaningful opportunity to be heard and to vindicate their legal rights.

## SUMMARY OF ARGUMENT

Studies of decisions rendered pursuant to certain arbitration programs, including programs administered by the National Arbitration Forum and by certain HMOs, reveal disturbing patterns of unfair bias against consumers. At least one arbitration provider, the National Arbitration Forum, almost openly markets its bias to sellers of consumer goods and services. The National Arbitration Forum has also adopted rules that can, under certain circumstances, put consumers at a significant disadvantage in the presentation of their claims.

Given the apparent unfairness that seems to exist in these particular forums and the potential for other forums to evolve in similar directions, the courts should reserve to themselves the role of gatekeeper to distinguish between fair and unfair arbitration forums and to ensure that consumers are not forced into forums that unfairly impair their claims. This is particularly true when the alleged unfairness results from the actions of the arbitration provider itself.



Where as here, an arbitration agreement is alleged to be unenforceable because it contains an unconscionable term, the Court should not rewrite the agreement to make it enforceable. To do so would be inconsistent with the FAA's requirement that arbitration agreements be enforced as written, would be an improper application of basic contract law, and would invite overreaching sellers to include unconscionable provisions in their arbitration clauses for tactical advantage.

Finally, because the grounds upon which a court may review the results of an arbitrator's decision are extremely narrow, a relatively extraordinary error is required to set aside such a decision. Accordingly, empowering an arbitrator to decide in the "first instance" whether a statutory remedy is available to the Respondents is for all practical purposes authorizing a final decision by the arbitrator, with little likelihood of any meaningful review.

## ARGUMENT

### I. The Courts Should Protect Consumers From Arbitration Requirements That Are Unconscionable or Prevent the Vindication of Important Statutory Rights

The role of arbitration has dramatically changed in recent years. It is no longer primarily a tool for resolving commercial disputes between sophisticated parties. Increasingly, consumers who seek to borrow money, purchase a home or a car, contract for telephone or other services, or even use the Internet are presented with contracts requiring them to submit disputes to arbitration.

These arbitration contracts are not merely used to streamline the process of resolving disputes. Instead, they are increasingly being used to unfairly thwart consumer rights and remedies.

There is evidence that some arbitration providers, notably the National Arbitration Forum, a for-profit entity based in Minnesota, have tilted the arbitration playing field against consumers by operating forums that are consistently and unfairly biased against consumers. The pattern of unfair bias is demonstrated in the decisions of their arbitrators and can be understood by looking at their procedures and the impact of those procedures on consumer claims.

It is incumbent upon courts to ensure that arbitration is not misused in this fashion. Under Section 2 of the Federal Arbitration Act, courts should refuse to enforce arbitration agreements if they are unconscionable, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991); *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996), or if they prevent the vindication of statutory rights. *Equal Employment Opportunity Comm'n v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).

### A. Studies Reveal Significant Biases in the Outcomes of Arbitrations Conducted by Certain Providers, including HMOs and the National Arbitration Forum

There is significant evidence of actual bias in the results obtained in arbitrations administered by certain entities.



The California Research Bureau, a non-partisan agency within the California State Library, studied the results of arbitration by California HMOs. The Bureau issued a report finding that arbitrators were 20 times more likely to enter summary judgment for HMOs than were courts and that the awards to plaintiffs by arbitrators were lower than those by courts. Marcus Nieto & Margaret Hosel, California Research Bureau No. 00-09, *Arbitration in California Managed Health Care Systems* 18 (Dec. 2000).[2] The Bureau also found that 30 percent of one HMO's claims were decided by 8 repeat arbitrators (five or more arbitrations each) and that six of these eight repeat arbitrators ruled in favor of the HMO in four-fifths of their cases. By contrast, in each of 3 instances in which an arbitrator awarded a plaintiff more than $1,000,000, the arbitrator was not employed in any other cases. Nieto and Hosel, at 22-23.

Another study, reviewing arbitrations administered by the National Arbitration Forum, suggests that NAF influences the selection of decision makers for the benefit of repeat players. Michael Geist, a Professor at the University of Ottowa Law School, found that NAF Arbitrators rule for the complainant in internet domain dispute resolutions far more often than arbitrators from other providers, because of NAF's practice of "granting an ever-larger share of its caseload to a small group of panelists."

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[2] This report is available in two parts from the California State Library's web site at the following addresses: http://www.library.ca.gov/crb/00/09/00-009.pdf (report) and http://www.library.ca.gov/crb/00/09/Appendix_009.pdf (appendix).

*New UDRP Study Finds Forum Shopping, Panel Problems*, ADRWorld.com (March 26, 2002).[3] The study found that three of NAF's busiest arbitrators decided all 324 out of 324 cases in favor of complainants in default cases, while noting that default cases in this setting are not automatic wins in front to non-NAF arbitrators because of the UDRP's proof requirements.[4] *Id.*

Perhaps the most striking evidence of bias was revealed in interrogatory answers filed in *Bownes v. First USA Bank, N.A.*, Civil Action No. 99-2479-PR (Cir. Ct. Montgomery Cty., Alabama). In an interrogatory response in that case, First USA stated that it had prevailed in 19,618 cases before the National Arbitration Forum while its card members had prevailed in only 87 cases. Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, Wash. Post (March 1, 2000). First USA's success rate of 99.6% is astounding and strongly suggests that the National Arbitration Forum is unable to provide a fair and unbiased mechanism for resolution of disputes involving First USA.

[3] This article can be found on the ADRWorld.com website at the following address: http://www.adrworld.com/opendocument.asp?Doc=uLrb7JKqR0&printerfriendly=1&limit=300&code=UuhOoC6V (subscription required). A copy of the article is included at page 2 of the Appendix to this brief.

[4] UDRP refers to the Uniform Domain Name Dispute Resolution Policy as set forth by the Internet Corporation for Assigned Names and Numbers ("ICANN") on its website and incorporated into domain name registration agreements. The policy can be found at http://www.icann.org/udrp/udrp-policy-24oct99.htm.



### B. Arbitration Providers Like the National Arbitration Forum Have the Ability to Create Forums That Are Unfairly Biased Against Consumer Claims

There are many potential sources of bias in consumer arbitrations. Arbitration providers have the ultimate control over the fairness of their arbitration because they have control over their rules. These rules may appear neutral on their face, but may in reality unfairly bias the arbitration process. Unfair bias can arise as a result of the internal workings of a particular rule, or as a result of the interplay between the rule and a particular party or a particular kind of dispute. Consideration of some of the National Arbitration Forum's Rules illustrates the way such unfair bias can occur.

#### 1. Repeat Player Bias Can Result From the Interplay Between Rules like the National Arbitration Forum's Confidentiality Rule and Repeat Players' Experiences With the Forum

The results of the studies discussed above suggest a substantial amount of what has been called "repeat player bias."

In the consumer context, the repeat player is almost always the seller of the goods and services from which the dispute arises. Repeat players typically exercise control over the designation of the forum by unilaterally drafting the arbitration clause and presenting it to the consumer as a non-negotiable part of a form contract. The consumer's choice is to either accept the contract or forgo the purchase.

Repeat player bias can appear as an unfair advantage for the repeat player within an otherwise neutral forum. Such bias can be fostered by rules like the National Arbitration Forum's confidentiality rule.[5] Repeat players are able to gain an advantage by cataloging their own experience with the forum. The confidentiality rule makes it virtually impossible for infrequent users such as consumers to access this same information.

This information can afford repeat players an advantage in the manner in which they present cases to decision makers. Prior knowledge of how a particular decision maker has responded to particular arguments allows repeat players to tailor presentations to individual decision makers. Absent such knowledge, consumers have no similar opportunity.

This information can also afford repeat players an advantage in the manner in which decision makers are selected. The National Arbitration Forum provides participants with a list of arbitrators equal in number to the number of parties plus the number of arbitrators required to hear the case, then allows each party to strike one arbitrator.[6] A repeat player in this system has a superior ability to exclude the arbitrator who has demonstrated in the past that he or she is most likely to render an unfavorable decision.

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[5] National Arbitration Forum Rule 4. (The National Arbitration Forum Rules referenced herein are set forth on page 1 of the Appendix to this brief.)

[6] National Arbitration Forum Rule 21(D).



This type of advantage may well explain some of the bias found in the California Research Board's report on HMO arbitration. To the extent HMOs were able to use secret information to steer cases away from arbitrators with a history of making large awards, they would have an of unfair advantage over the consumers making claims.

### 2. Repeat Player Bias Can Also Result From Business Relationships Between Repeat Players and an Arbitration Forum

Repeat player bias can also appear in the form of unfair conduct by the administrator of the forum. Such bias can be driven by the arbitration provider's need for repeat business. The potential for this sort of bias is well documented. The Equal Employment Opportunity Commission has stated that "results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitration." Gilbert F. Caselias, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 11 EEOC Compliance Manual at 8 (July 10, 1997). *See also* David Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 Wisc. L. Rev. 33, 61 ("[T]he independent arbitration companies have an economic interest in being looked on kindly by large institutional corporate defendants who can bring in repeat business.").

While it is not clear why First USA Bank was able to win 99.6% of its arbitrations in the National Arbitration Forum, it is clear that by using the Forum for almost 20,000 arbitrations, First USA Bank represented a significant amount of business for the Forum. Given this

extraordinary volume of business it is hard to imagine that the Forum functioned as anything other than an extension of First USA's general counsel's office.

### 3. Arbitration Rules Like the National Arbitration Forum's Loser Pays and Capped Claims Rules Can Be Additional Sources of Unfair Bias in Consumer Arbitrations

Other rules, such as the National Arbitration Forum's "loser pays" rule, which permits the award of fees and costs to any party,[7] and its "capped claim" rule, which prohibits awards in excess of the amount claimed,[8] can significantly bias a forum against consumer claims.

Although loser pays rules are promoted as deterrents to frivolous litigation, they penalize all claimants. Loser pays rules essentially reduce the value of a claim by the amount of a possible loser pays award multiplied by the probability of suffering the loser pays award. For example, a claim valued at $12,000 on its face may be worth $9,000 if the claimant has a 75% chance of success. The value of the claim is reduced to $8,000 if a loser pays rule introduces a 25% chance of suffering a $4,000 loser pays award. Every claim has some element of risk. Accordingly, loser pays rules operate to reduce the value of all claims, not just frivolous claims. The smaller the claim relative to the fees and costs at stake, the greater the impact of the loser

[7] National Arbitration Forum Rule 37(C).

[8] National Arbitration Forum Rule 37(B).



pays rule. As a result, the effect of the rule on small consumer claims can be particularly harsh.

Although loser pays rules are widely sought by the tort reform lobby, they have not been widely implemented in most U.S. jurisdictions. To the extent that they apply to consumer claims, federal and state rules awarding fees to prevailing defendants are typically limited to instances in which the factfinder determines the plaintiff's claim to be frivolous,[9] thereby avoiding negative impact on the vast majority of non-frivolous claims asserted in courts.

The National Arbitration Forum's loser pays rule can be a further source of bias against consumer cases because it turns the economics of those cases upside down. Most state and federal consumer protection statutes award attorney's fees to prevailing consumers as an incentive to ensure that consumers with small claims have access to the courts. By enforcing a loser pays rule, an arbitration provider can effectively neutralize this important and widely granted incentive.

Another National Arbitration Forum rule that biases that forum against consumers is its capped claim rule. Under the capped claim rule, if an arbitrator decides that the evidence supports an award in excess of the amount

[9] A typical example of such a rule under federal law is the Fair Debt Collection Act, 15 U.S.C. § 1621k(a)(3), which requires a finding that an action was brought "in bad faith and for the purpose of harassment" as a prerequisite to an award to the defendant. The Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.50(c) is typical of many state consumer protection laws in limiting awards of fees to defendants to actions that were "groundless in fact or law or brought in bad faith, or brought for the purpose of harassment."

requested, he or she must disregard the evidence and award the smaller amount.

The significance of this rule was emphasized in a February 24, 1997 letter from Ed Anderson, Managing Director of the National Arbitration Forum to Richard Shepherd, General Counsel of Saxon Mortgage, Inc.[10] In the letter, Mr. Anderson thanked Mr. Shepherd for sharing a copy of Saxon's arbitration clause and expresses disappointment that Saxon invoked the rules of "the other guys." Mr. Anderson pointed out that all arbitration systems are not the same and in particular noted that failure to "have a claim capped could have drastic consequences." He closed the letter with his wish that a future version of the clause would designate the NAF as the arbitration provider.

Mr. Anderson also touted the effect of the Forum's rules on the desirability of arbitration for businesses in an interview with a magazine targeted to corporate counsel. Mr. Anderson described the Forum's loser pays rule as making "[t]he economics of dispute resolution by arbitration . . . entirely different from the economics of bringing lawsuits." *Do An LRA: Implement Your Own Civil Justice Reform Program NOW*, Metropolitan Corporate Counsel (Aug. 2001).

The clear import of the discussion with Mr. Anderson was that NAF's arbitration rules afford businesses

[10] A copy of this letter is included at page 6 of the appendix to this brief, as one of a series of letters (appendix 4-7) between NAF and Mr. Shepherd touting the NAF.



substantive legal advantages in their disputes with consumers that they would not find in court proceedings.

### 4. An Arbitration Forum Can be Unfairly Biased as a Result of Other Factors

Of course, arbitration rules are not the only potential sources of unfairness in consumer arbitrations. As the Court recognized in *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 90 (2000), high arbitration fees and costs can potentially bar the claims of consumers who do not have the means to pay.

Similarly, as is at issue in the case at bar, sellers of consumer goods and services can attempt to gain advantage in arbitration by explicitly altering the rules of the forum or by including other limitations on rights or remedies in the terms of the arbitration agreement. The bias can be overt, as would be the case if the term applies only to the consumer, or covert, as would be the case if the term applies to both parties, but applies to a right or remedy only of value to the consumer.

### 5. Cumulative Unfair Bias in An Arbitration Forum Can Effectively Bar Small Consumer Claims

There may not be any single overridingly unfair feature of a particular arbitration forum. Even so, the sum total of lesser unfairnesses and biases can rise to the level of unconscionability. This is particularly true for consumers as their claims, while meritorious, are often small and therefore sensitive to even minor impediments. Of course, the converse is true for large consumer claims. Such

claims may be relatively unaffected by certain kinds of impediments, such as a loser pays rule.

Arbitration's claim of superior efficiency is founded in large part upon its flexible procedures. However, when those procedures are abused in the ways described above or in new ways not yet invented, many consumers risk being stripped of their right to basic fairness.

Ironically, many meritorious consumer claims are not large enough to be economically viable in the current legal system. The promise of consumer arbitration is that reduced legal fees and increased efficiency can revive such small claims. However, in the wrong forum, the bias against consumer claims can devalue those claims to such an extent that no amount of efficiency and fee reduction can make them viable.

### C. Courts Must Act As Gatekeepers to Protect Consumers From the Unconscionable Use of Biased Arbitration Forums

A gatekeeper is necessary to distinguish in individual cases between reasonable agreements to arbitrate and arbitration agreements that are unconscionable or that prevent the vindication of statutory rights. As the Court noted in *Green Tree Financial Corp. v. Randolph*, this inquiry is essentially a factual one. *Green Tree*, 531 U.S. at 91-92. Given the variety of arbitration forums and the flexibility with which arbitration providers and the drafters of arbitration contracts can adjust and modify the operation of the forums and given the myriad means by which unfair bias can be injected into the arbitration process, it is not possible to establish a one-size-fits-all rule that clearly distinguishes the acceptable from the



unacceptable. Each case must be judged according to its own circumstances.

The gatekeeper must be able to fairly examine not only the terms of the arbitration agreement, but the arbitration rules and procedures of the forums themselves to determine whether consumers have fair opportunities to present their claims.

It is not reasonable to rely upon an arbitrator to evaluate the fairness of his or her own forum subject only to the kind of oversight afforded by post-arbitration review under the FAA. The inherent conflict of interest involved is too great to rely upon such an evaluation to safeguard consumer interests.

It is therefore incumbent upon the courts, as provided in Section 2 of the FAA, to act as gatekeepers to ensure that consumers are not subjected to forums in which their access and ability to participate is impaired in an unconscionable manner or in a manner that prevents vindication of their statutory rights.

## II. Courts Should Not Reward Overreaching By Rewriting Unconscionable Arbitration Clauses To Make Them Enforceable.

The Petitioner HMOs suggest to the Court that if it agrees with the courts below that the limitation on punitive damages language in the arbitration clause is impermissible, it should be severed from the arbitration clause and the remainder of the clause enforced. Brief of Petitioners at 40-43. The Court should not indulge this suggestion.

The Court has held that arbitration agreements are to be enforced according to their terms. *Volt Info Sciences, Inc. v. Bd. Of Trustees*, 489 U.S. 468, 479 (1989). If a court strikes illegal provisions or adds other provisions to an arbitration clause, it is not enforcing an agreement according to its terms, and thus violates (rather than follows) the FAA.

In essence, the Petitioners are proposing to amend the arbitration agreement. Their unilateral offer to amend need not be accepted by the Respondents, and the Court should not force such an amendment upon the Respondents. *Popovich v. McDonald's Corp.*, 189 F. Supp. 2d 772, 779 (N.D. Ill. 2002); *Flyer Printing Co. v. Hill*, 805 So. 2d 829, 833 (Fla. Ct. App. 2001); and *Lelouis v. W. Directory Co.*, 2001 U.S. Dist. LEXIS 12517, *28 (D. Or. Aug. 10, 2001).

When a corporation drafts an unenforceable contract of adhesion, it is not the responsibility of a court to supply the legal acumen to re-write the contract to find a legal way for the drafter to enjoy the otherwise unobtainable results. As a comment to the Restatement (Second) of Contracts states, "a court will not aid a party who has taken advantage of his dominant bargaining power to extract from the other party a promise that is clearly so broad as to offend public policy by redrafting the agreement so as to make a part of the promise enforceable." Restatement (Second) of Contracts, § 184, comment b.

Finally, redrafting the arbitration clause after the fact would invite overreaching. The burden of proving a contract unenforceable is substantial, both in terms of the legal standard and the cost of litigating a fact intensive



inquiry into unconscionability. If the drafter of an arbitration agreement knows that the unconscionable portions of the agreement will simply be stricken, without risk of losing the benefit of the entire agreement, then it has every incentive to include unlawful provisions in such agreements, knowing that even if ultimately stricken, such provisions may deter claims from being filed or at the very least make claims more costly to pursue. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 124 (Cal. 2000); *Cooper v. MRM Investment Co.*, 199 F. Supp. 2d 771, 782 (M.D. Tenn. 2000); *Lelouis* at 2001 U.S. Dist. LEXIS at 12517 at *29.

## III. Examining the Extremely Limited Grounds For Reviewing an Arbitrator's Decision Demonstrates That Empowering an Arbitrator to Decide an Issue "In the First Instance", is in Actuality, Authorizing a Final Decision

A court's authority to review or set aside an arbitrator's decision "'is among the narrowest known to the law.' For courts 'do not sit to hear claims of factual or legal error by an arbitrator[,] as an appellate court does in reviewing decisions of lower courts. . . .' In fact, 'federal court review of arbitral decisions is extremely narrow and extraordinarily deferential.'" *Coastal Oil v. Teamsters Local Union No. 25*, 134 F.3d 466, 469 (1st Cir. 1998) (citations omitted).

The narrow bases for overturning an arbitration decision are restricted to statutory or judicially created grounds.

The four statutory bases are found in the Federal Arbitration Act (FAA), 9 U.S.C. §§ 10 and 11 (2002), and are limited to circumstances "relating to the breakdown in

the integrity of the arbitration process itself." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995).

The single judicially created basis requires that a decision be made in "manifest disregard of the law." *Id.* (*citing Wilko v. Swan*, 346 U.S. 427 (1953)). Courts have interpreted and applied these standards extremely narrowly, erecting a formidable barrier for a party seeking to vacate a decision and, for all intents and purposes, rendering an arbitrator's decision final.

### A. The Four Statutory Bases

The FAA authorizes a court to vacate an arbitration award in four instances: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators, or either of them; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior that prejudiced a party's rights; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a). Applying these standards, courts vacate arbitral decisions in only the most narrow circumstances.

#### 1. Corruption, Fraud, Undue Means

A party seeking to vacate a decision under 9 U.S.C. § 10(a)(1), because it was procured by corruption, fraud, or



undue means, generally must show, by clear and convincing evidence, that the necessary misconduct occurred, was not discovered with due diligence before or during the proceeding, and that it was material to an issue in the arbitration. *See, e.g., Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir. 1988).

A decision that is attributable to corruption or fraud nevertheless will be enforced if the party challenging it could have discovered it and brought it to the arbitrator's attention before the decision was rendered. *See, e.g., Delta Mine Holding Co. v. AFC Coal Props., Inc.*, 280 F.2d 815, 821 (8th Cir. 2001). Such a decision will also be enforced if there was no nexus between the corruption or fraud and the arbitrator's decision. *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1990). *But see Bonar*, 835 F.2d at 1383-385.

The phrase "undue means," as used in this section to describe a basis for overturning an award, has been narrowly construed. In *Am. Postal Workers Union v. U.S. Postal Serv.*, for example, the court said that undue means was "limited to an action by a party that is equivalent in gravity to corruption or fraud, such as a physical threat to an arbitrator or other improper influence." 52 F.3d 359, 362 (D.C. Cir. 1995).

#### 2. Evident Arbitrator Partiality or Corruption

In construing 9 U.S.C. § 10(a)(2) (2002), the Court has said that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). The

Court thus vacated an award based on bias where the arbitrator previously had conducted regular business as a consultant for one of the parties but had not disclosed this relationship to the opposing party. *Id.* at 147-48. Other courts have required compliance with this disclosure requirement. *See Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 51 F.3d 157, 159 (8th Cir. 1995).

But for challenges based upon such failures to disclose, a challenge based on arbitrator partiality or corruption "must establish specific facts that indicate improper motives on the part of the arbitrator" and that the "alleged impartiality [is] direct, definite, and capable of demonstration." *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000), *cert. denied*, 531 U.S. 878 (2000).

It is insufficient to rely merely on an individual arbitrator's financial interest outside the specific case being arbitrated. *See, e.g., Harter v. Iowa Grain Co.*, 220 F.3d 544, 555 (7th Cir. 2000). Nor have parties succeeded in showing structural bias based on an arbitration service provider's financial interests or its decisional record in other cases involving a party appearing before it in more than one matter. *See, e.g., The Andersons, Inc. v. Horton Farms, Inc.*, 166 F.3d 308, 329 (6th Cir. 1998).

#### 3. Arbitrator Misconduct Concerning Postponement, Evidence, Etc.

A court may vacate an arbitration decision when an arbitrator has refused to postpone a hearing upon sufficient cause shown, 9 U.S.C. § 10(a)(3), but here too the party seeking to overturn the decision has a significant burden. *Floyd County Bd. of Educ. v. EUA Cogenex Corp.*, 19 F. Supp. 2d 735 (E.D. Ky. 1998), *rev'd*, 198 F.3d 245 (6th



Cir. 1999) (unpublished) (text available at 1999 U.S. App. LEXIS 29692). Noting that "a court's review of an arbitrator's decision not to postpone a hearing must necessarily be limited," 1999 U.S. App. LEXIS 29692 at *6, the court stated that the party seeking to vacate an award "must prove by clear and convincing evidence that the arbitrator had no reasonable basis for his decision." *Id.* at *7.

#### 4. Arbitrators Exceeding Their Powers

The FAA provides that a court can vacate a decision when arbitrators exceed their powers or fail to render a final decision. 9 U.S.C. § 10(a)(4). Because arbitrators derive their powers from the parties' agreement and there is no federal policy favoring arbitration of claims the parties have not agreed to arbitrate, a court can vacate an award on a claim not covered by an agreement. *See, e.g., Geneva Secs., Inc. v. Johnson*, 138 F.3d 688, 692 (7th Cir. 1998). Courts have also declined to enforce arbitration awards that involve parties who were not subject to the underlying arbitration agreement or which granted relief the arbitrator was not authorized to award. *See, e.g., Pa. Power Co. v. Int'l Brotherhood of Elec. Workers Local 272*, 276 F.3d 174, 179 (3d Cir. 2001).

### B. The Judicial Basis

While the FAA does not provide any grounds to vacate an arbitration decision related to the merits, the Court has recognized the availability of some judicial review of the merits of arbitral awards. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). Despite the importance of resolving a claim according to the proper statutory standards and requirements, even here, in

contrast to the review of a lower court's ruling, judicial review is quite limited. *See, e.g., First Options*, 514 U.S. at 942; *Lattimer-Stevens Co. v. United Steelworkers of Am. Dist. 27*, 913 F.2d 1166, 1169 (6th Cir. 1990).

Courts reviewing the merits of an arbitration decision generally follow *First Options* and *Wilko* to determine whether the decision reflects a "manifest disregard of the law." While courts use different formulations of this standard, their decisions are consistent to the extent that it is a difficult standard to meet. Some courts draw a distinction between an arbitrator's misinterpretation of the law, which would not justify vacating an award, and a manifest disregard of the law. For example, in *Merrill Lynch, Pierce, Fenner & Smith, Inv. v. Jaros*, the Sixth Circuit stated that manifest disregard is "a very narrow standard of review. A mere error in interpretation or application of the law is insufficient. Rather, the decision must fly in the face of clearly established legal precedent." 70 F.3d 418, 421 (6th Cir. 1995). Moreover, the arbitrator must have refused to follow an applicable legal principle that was clearly defined and not subject to reasonable debate. *Id.*

Some courts also require proof that the party seeking to vacate the award had clearly informed the arbitrator of the controlling legal standard. Thus, the Second Circuit enforced a decision that denied a prevailing plaintiff attorneys' fees under the Age Discrimination in Employment Act (ADEA). While fees are mandatory under the Act, the court found the plaintiff's mere assertion that he was entitled to fees was insufficient to inform the arbitrator of the statutory requirement. *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 822-23 (2d Cir. 1997).



Other courts look at whether any basis in the record could justify the arbitrator's decision and will only vacate awards that are wholly irrational. In the Sixth Circuit, for example, an award must be confirmed if a court can find any legally plausible argument to support it. *Jaros*, 70 F.3d at 421. In the Second Circuit the arbitrator's "error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1987).

Because manifest disregard must be apparent on the face of the record, the significant burden placed on a party seeking to overturn a decision on this basis is compounded by the fact that arbitrators are not required to issue written decisions or to explain their decisions. The Sixth Circuit recognized this, stating:

> Where, as here, the arbitrators decline to explain their resolution of certain questions of law, a party seeking to have the award set aside faces a tremendous obstacle. If a court can find any line of argument that is legally plausible and supports the award, then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside.

*Jaros*, 70 F.3d at 421.

The extremely limited bases for challenging an arbitral award, both under the FAA and the "manifest disregard" standard, and the significant burden placed on parties seeking to establish one of these bases, demonstrate that allowing an arbitrator to decide "in the first instance" whether a statutory remedy is available notwithstanding an explicit prohibition in the arbitration

clause will, in most instances, allow the arbitrator to render a final decision. This result should not be allowed as it creates too large a possibility that an erroneous determination will go unchallenged and flies in the face of the Court's ruling that parties must be able to vindicate their statutory rights in arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

## CONCLUSION

For these reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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January 13, 2003



## Appendix

National Arbitration Forum (Selected Rules) (2001) ... App. 1

*New UDRP Study Finds Forum Shopping, Panel Problems*, ADRWorld.com (March 26, 2002) ..... App. 2

Sept. 23, 1996 Letter to Richard E. Shephard from Curtis D. Brown ..... App. 5

Jan. 29, 1997 Letter to Richard E. Shephard from Leif Stennes ..... App. 6

Feb. 24, 1997 Letter to Richard E. Shephard from Edward C. Anderson ..... App. 8

Sept. 4, 1998 Letter to Richard E. Shephard from Edward C. Anderson ..... App. 9

**National Arbitration Forum**

Selected Rules (June 1, 2001)

Rule 4. Confidentiality.

Arbitration proceedings are confidential, unless all Parties agree otherwise. A Party who improperly discloses confidential information shall be subject to sanctions. The Arbitrator, Director, and Forum staff shall not disclose confidential information. Parties may disclose Orders and Awards they receive.

Rule 21. Selection of Arbitrators.

D. For a Participatory Hearing in a matter which is not a Small Claim and in which the Claimant is an individual and not a business or other entity, the Director shall provide to each Party a list of Arbitrator candidates equal in number to the number of Parties plus the number of Arbitrators required under Rule 22. Each Party may notify the Director in writing, within ten (10) days of the date of receipt of the list, striking one of the candidates. A Party may request disqualification of any other Arbitrator in accord with Rule 23.

Rule 37. Awards.

B. An Award shall not exceed the money or relief requested in a Claim or amended Claim and any amount awarded under Rule 37(C).

C. An Award may include fees and costs awarded by an Arbitrator in favor of any Party as permitted by law or in favor of the Forum for fees due.

**New UDRP Study Finds Forum Shopping, Panel Problems**

March 26, 2002 By Staff Reporters, ADRWorld.com

A new study suggests that the outcome of cases under the Internet Corporation for Assigned Names and Numbers' domain name dispute resolution policy may depend on the arbitration provider selected by complainants, raising concerns about forum shopping under the policy.

Michael Geist, a professor at the University of Ottawa Law School and author of the study Fundamentally Fair.com, said his findings show that "nothing much has changed" to improve the Internet Corporation for Assigned Names and Numbers' (ICANN) Uniform Dispute Resolution Policy (UDRP). The study, which is a follow-up to a similar survey conducted by Geist last year, indicates that "things have actually gotten worse" with regard to differences between the outcomes of cases handled by different arbitration providers.

Geist also said the study shows that case outcomes can hinge on whether they are heard by a single arbitrator or a three-member panel.

The UDRP provides an expedited arbitration procedure to settle disputes over the registration of Internet domain names that may infringe upon a trademark or intellectual property. Currently, UDRP arbitrations are administered by three organizations: the CPR Institute for Dispute Resolution, the National Arbitration Forum and the World Intellectual Property Organization. A fourth provider, eResolution, quit the business earlier this year.

In August 2001, Geist released the results of Fair.com?: An Examination of the Allegations of Systematic Unfairness



in the ICANN UDRP, which identified problems with forum shopping – parties going to an arbitrator provider who is more likely to rule in their favor – and case outcomes. However, the study was criticized by some who said the results could be attributed to its inclusion of "default cases" where a respondent declined or otherwise failed to participate in the arbitration process.

The new study more clearly accounts for default and non-default cases, and the "default cases have no bearing on non-default issues," Geist said.

Geist said the follow-up study shows that for non-default cases, complainants won 70 percent of the time when the complainant selected either the World Intellectual Property Association or the National Arbitration Forum. Claimants who used eResolution to administer their arbitration won in 50 percent of the cases.

The study's analysis of default cases also showed differences between providers: Complainants won 98 percent of the cases before NAF, 92 percent of the cases before WIPO, and 79 of the cases before eResolution. Default cases are "not automatic wins" because complainants must still prove that a registration infringes on their trademark and meet other tests under the UDRP, and the study still indicates differences in outcomes, Geist said.

In addition, the study shows that three of NAF's busiest panelists have decided 324 out of 324 cases in favor of complainants in default cases with the two other busiest panelists deciding 184 out of 187 default cases in favor of the complainant.

The study also shows variations in cases when a complaint is heard by a single arbitrator versus a three-member

arbitration panel: Complainants won 68 percent of cases before a single arbitrator panel, but only 46 percent of those before a three-member panel, Geist said.

The study analyzed all 4332 cases completed as of Feb 18, 2002 and included a detailed look at the cases examined in the original study "to verify the accuracy of the data, the collection of default information" and new decisions since July 2001. The follow-up study "provides compelling evidence that forum shopping and suspect case allocation concerns continue to taint the fairness of the ICANN UDRP," according to Geist's report.

Geist said "there are some real systematic problems with the UDRP," and changes should be considered regarding selection of arbitration providers and using three-member arbitration panels for contested cases. In his report, he said with eResolution in bankruptcy, "NAF granting an ever-larger share of its caseload to a small group of panelists, and the red herring of defaults vs. non-defaults conclusively disproved, the need for ICANN UDRP reform has become increasingly urgent."

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[LOGO] NATIONAL ARBITRATION FORUM

September 23, 1996

Richard E. Shephard
Asst. Gen'l Counsel
Saxon Mortgage, Inc.
4880 Cox Rd.
Glen Allen, VA 23060

Dear Richard:

Thanks for your call last week. It was good talking to you.

Following on our conversation, I am enclosing the **National Arbitration Forum's 1996 Arbitration Overview** for your review.

By adding arbitration language to your contracts, the National Arbitration Forum's national system of arbitration lets you minimize lawsuits, and the threat of lender liability jury verdicts.

We have successfully handled more than 20,000 creditor-debtor and other cases nationwide. You will probably be most interested in the **Gammaro** case that is enclosed since it involves the National Arbitration Forum in a mortgage transaction.

After you have had a chance to review these materials, I will give you a call. In the meantime, if you have any questions, do not hesitate to contact me.

Sincerely,

/s/ Brown
Curtis D. Brown, Esq.
Director of Development

CDB/ls
Enclosures

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[LOGO] NATIONAL ARBITRATION FORUM

January 29, 1997

Richard Sheppard
General Counsel
Saxon Mortgage, Inc.
4880 Cox Rd.
Glen Allen, VA 23060

Dear Richard:

Enclosed is the information you requested. As these articles point out, arbitration has great advantages over litigation. There is no reason for Saxton Mortgage, Inc. to be exposed to the costs and risks of the jury system.

When considering arbitration providers, remember, all arbitration is not the same. The Forum's procedures offer the most rational system for lenders and their customers. At the **National Arbitration Forum**:

Every issue is **resolved according to the law.**

Every decision is **made by a legal professional.**

Every award is **limited to the amount claimed.**

Every claim is **decided on its own merits.**

To review further information regarding arbitration law and implementing arbitration in your business, give us a call at 800/474-2371.



Sincerely,

National Arbitration Forum

/s/ Leif Stennes
Leif Stennes
Policy Analyst

LMS:ls
Enc

[LOGO] NATIONAL ARBITRATION FORUM

Monday, February 24, 1997

Richard Shepherd
General Counsel
Saxon Mortgage, Inc.
4880 Cox Road
Glen Allen, VA 23060

Dear Dick:

Thank you for sending a copy of your arbitration clause. We were disappointed to see you had invoked the Rules of "the other guys".

All arbitration systems are **not** the same!

At the **National Arbitration Forum**:

Every issue is **resolved according to the law!**

Every decision is **made by a legal professional!**

Every award is **limited to the amount claimed!**

Every claim is **decided on its own merits!**

The failure to follow the law or to have a claim "capped" could have drastic consequences. We hope, when you redraft this form, we can convince you that our team of professionals can deliver better service for you and your customers.

Sincerely,

/s/ Edward C. Anderson
Edward C. Anderson
Managing Director

ECA:mkm

Enc

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[LOGO] NATIONAL ARBITRATION FORUM

Friday, September 04, 1998

Richard Shepherd
Saxon Mortgage, Inc.
4880 Cox Road
Glen Allen, VA 23060

Dear Dick,

The presentations at the **1998 ABA Convention** confirmed what has become national knowledge: Arbitration can save financial providers millions of dollars *and* properly drafted **arbitration clauses will be enforced!**

There have been hundreds of pro-arbitration court opinions in the last year, as tens of millions of contracts have included arbitration clauses.

As analysis has become more sophisticated, it becomes increasingly important to conform arbitration agreements to the legal standards created by the courts. To that end, the **Forum** has adopted the *Consumer Due Process Standard*, setting out the minimum requirements for agreements adopting arbitration for consumer disputes. Conforming to the *Standard* will assure that an arbitration clause meets legal requirements throughout the country.

The *Code of Procedure* of the **National Arbitration Forum** has been the choice of more businesses in the last year than any alternative. To learn why, talk to the lawyers on the attached list or give us a call at 800/474-2371.

Sincerely,

/s/ Edward C. Anderson
Edward C. Anderson
Director

ECA:mkm

Enc

(12)

FILED

JAN 13 2003

OFFICE OF THE CLERK

No. 02-215

IN THE

# Supreme Court of the United States

PACIFICARE HEALTH SYSTEMS, INC., ET AL.,

*Petitioners,*

v.

JEFFREY BOOK, D.O., ET AL.,

*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

## BRIEF OF PUBLIC CITIZEN, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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January 13, 2003

BEST AVAILABLE COPY

22 pp

## QUESTION PRESENTED

Whether it would violate public policy to require a party to arbitrate a RICO claim under an arbitration agreement that does not allow the arbitrators to grant the remedies provided by statute for such a claim.

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## INTEREST OF AMICI CURIAE[1]

Amicus curiae Public Citizen, Inc., is a non-profit advocacy group with more than 135,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Among Public Citizen's principal concerns is the protection of the rights of consumers and employees, particularly in their dealings with large corporations. Increasingly, consumers are forced, as a condition of routine transactions such as obtaining credit cards, long distance telephone service, and insurance, to enter into form arbitration agreements, the terms of which are typically non-negotiable from the standpoint of the individual consumer. Similarly, more and more employees are compelled to agree to arbitration of employment disputes as a condition of employment. For employees who are not represented by unions in a collective bargaining environment, those arbitration agreements are generally not subject to meaningful negotiation either. And, because of the ubiquity of arbitration agreements in the securities industry, the millions of small investors whose savings for retirement and their children's education are invested in the stock market are also, for the most part, parties to agreements with arbitration clauses that they had no opportunity to negotiate.

Thus, many citizens are effectively forced to rely on arbitration rather than the judicial system, at least in the first instance, for the vindication of their rights—including not only common-law rights but also rights under a variety of federal statutes intended to protect them against discrimination, fraud, and other forms of commercial overreaching. It is therefore essential, if the objectives of such laws are to be

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[1] Letters of consent from both parties to the filing of this brief have been filed with the Clerk. This brief was not authored, in whole or in part, by counsel for a party, and no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

fulfilled, to ensure that arbitration agreements, if they are to be enforced, provide full protection to rights granted by law. Arbitration clauses that discriminate against or deny full enforcement of the legal rights of the parties—for example, by denying remedies granted by federal law—are inimical to the protections that Public Citizen has fought to establish for consumers and employees. Because the arbitration clause the petitioners seek to enforce in this case would have precisely that effect, Public Citizen submits this amicus curiae brief in support of the respondents.

## SUMMARY OF ARGUMENT

The issue in this case is whether arbitration agreements that purport to cover claims under RICO but expressly deny arbitrators the power to award the form of relief provided for in that statute—that is, treble damages—may be enforced to compel arbitration of RICO treble damages claims. Both the district court and the Eleventh Circuit correctly held that such arbitration agreements violate public policy to the extent they purport to compel arbitration of statutory claims but deny the remedies provided by statute.

Enforcement of a predispute arbitration agreement that bars remedies provided by federal statute would amount to giving effect to a prospective waiver of substantive statutory rights. Although most statutory rights may be waived under appropriate circumstances (such as the knowing and voluntary settlement of claims based on past actions), *prospective* waivers of substantive rights have generally been held to be invalid by federal courts because they tend to encourage (or underdeter) statutory violations and thus undermine the public policies expressed in the statute.

For this reason, this Court has consistently and repeatedly emphasized that the enforcement of arbitration agreements presupposes that the parties will be able to obtain full vindication of their rights in the arbitration process, and it has expressly stated that it would not hesitate to find an arbitration



clause that purported to deny a party substantive rights guaranteed by federal law to be void as against public policy. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). The same consideration has led the nation's leading arbitration organizations to provide expressly in their rules that, contrary to the arbitration agreements at issue here, arbitrators must be free to provide all forms of relief available under the law.

The limitation on remedies incorporated in the agreements at issue is, accordingly, unenforceable. The remaining questions are whether the courts, as opposed to the arbitrators, have the power to say so, and when they may do so. The answer to the first question is clearly yes: Declaring the validity of the arbitration agreement itself is traditionally the role of the courts, and, indeed, the parties could not reasonably have contemplated that the arbitrators themselves would determine whether or not to disregard purported contractual limitations on their authority. As to the timing of the enforceability decision, the appropriate time is before the parties are compelled to go forward under a flawed arbitration scheme—particularly given that the nature of the arbitration process and of judicial review of arbitration awards may render post-arbitration review ineffective.

## ARGUMENT

### I. WAIVERS OF SUBSTANTIVE STATUTORY REMEDIES IN PREDISPUTE ARBITRATION AGREEMENTS ARE UNENFORCEABLE.

#### A. Prospective Waivers of Substantive Rights and Remedies Under Federal Statutes Such as RICO Violate Public Policy.

Although petitioners and their supporting amici seek to avoid the issue in a number of ways, their argument, at bottom, is that it is perfectly all right to enforce an agreement under which a party prospectively waives the right to obtain remedies for violations of federal law that have not yet oc-

curred.[2] In particular, they argue that a party may be held to a purely prospective waiver of RICO remedies. In other words, petitioners assert that if, in the future, they subject others to injuries resulting from a pattern of violations of federal criminal laws such as mail and wire fraud and extortion, their victims can be barred by contract from seeking the remedies provided by federal law for such violations.

Petitioners rely on decisions of this Court that have sustained waivers of statutory and even constitutional rights. The cases, they assert, stand for the principle that nearly any right may be waived under nearly any circumstance. But the Court's actual holdings have not been so broad. What the Court's holdings on waiver establish are two narrower, common-sense principles. First, procedural rights, including

[2] Petitioners and their amici attempt to argue in the alternative that this issue need not be reached because, they say, the agreements at issue, which bar punitive and "extracontractual" damages, do not really bar treble damages under RICO. Contrary to their suggestion, however, that is not an issue that turns on the nature of RICO treble damages as a matter of federal law. Rather, it is a question of contractual interpretation: What did the parties mean when they used the terms "punitive damages" or "extracontractual damages" in their contracts? The petition for certiorari in this case did not ask the Court to resolve that factbound question of state contract law and, in any event, it is not worthy of this Court's consideration. Moreover, it has been decided against petitioners by two lower courts, and under this Court's venerable "two-court rule," those decisions should not be disturbed here. *See, e.g., Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395 (1988); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). In any event, whether RICO treble damages are "punitive" or not (*cf. Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000) (treble damages under qui tam statute are "punitive")), the remedies available under RICO are certainly "extracontractual" under any plausible interpretation of the term: They are essentially tort remedies; a party's entitlement to them is not based on contract; the pre-trebling amount is not limited by legal doctrines that restrict damages for breach of contract; and the trebling of the damages is not dependent on contractual authorization.



rights of both civil and criminal procedure established by the Constitution, may generally be waived, at least in the course of a proceeding to which they would otherwise apply. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196 (1995) (holding that a defendant may waive the rule of evidence forbidding admission of statements made in plea negotiations); *New York v. Hill*, 528 U.S. 110 (2000) (holding that a defendant may waive procedural rights under the Interstate Agreement on Detainers). Second, most substantive rights and remedies may be waived as part of the settlement of an extant dispute, provided the waiver is knowing and voluntary. *See Evans v. Jeff D.*, 475 U.S. 717 (1986) (upholding waiver of right to attorney's fee as part of settlement of civil rights case); *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (waiver of civil rights claim in exchange for dropping criminal charges is enforceable if knowing and voluntary). There are, of course, limits even to these propositions: Some procedural rights may be unwaivable, *see Hill*, 528 U.S. at 116-17; *United States v. Olano*, 507 U.S. 725, 741 (1993) (Kennedy, J., concurring), and this Court has held that some substantive statutory remedies may not be waived even retrospectively, *see Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) (right to double damages for FLSA violations).

Notably, the cases cited by the petitioners and their amici do not uphold *prospective* waivers of substantive statutory rights.[3] That is no accident, for this Court and the lower courts have generally been unwilling to tolerate such waivers. This Court has held, for example, that an employee's rights under Title VII and similar antidiscrimination laws cannot be prospectively waived:

> To begin, we think it clear that there can be no prospective waiver of an employee's rights under Title VII. ...

[3] *See, e.g., Hill*, 528 U.S. at 115 ("This case does not involve a purported prospective waiver of all protection of the IAD's time limits or of the IAD generally, but merely agreement to a specified delay in trial.").

> Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. ... [W]aiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-52 (1974).

This principle is not limited to Title VII or antidiscrimination laws, but reflects a broader view that where a federal statute imposes a duty or standard of conduct and creates substantive rights and remedies to enforce that standard, private parties may not enter into contracts that prospectively exempt themselves from the statutory scheme. Thus, for example, this Court has also held that parties may not, by contract, free themselves from substantive obligations (and liabilities) under the Fair Labor Standards Act, *see, e.g., Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740-41 (1981); *Martino v. Michigan Window Cleaning Co.*, 327 U.S. 173 (1945), or the federal securities laws, *see Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987) ("[A] customer cannot negotiate a reduction in commissions in exchange for a waiver of compliance [by a broker] with the requirements of the Exchange Act, even if the customer knowingly and voluntarily agreed to the bargain."); *Wilko v. Swan*, 346 U.S. 427, 434 (1953).[4]

Similarly, the lower federal courts have held unenforceable or invalid a variety of agreements that seek to relieve a

[4] *Wilko*'s holding that securities claims may not be subject to predispute arbitration agreements at all has, of course, been overruled, *see Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), but the *Wilko* Court's condemnation of a contractual provision that would have relieved a broker of liability under the securities laws for any "representation or advice" (346 U.S. at 434) has not.



party prospectively from liabilities otherwise imposed by federal law. The Seventh Circuit, in a decision holding unenforceable a contractual provision that would have anticipatorily excused a defendant from liability under the Commodity Exchange Act, explained the underlying principle at work in such cases (and why they differ from cases involving retrospective waivers, such as *Evans v. Jeff D.*): "The waiver of substantive statutory rights after the violation has occurred is akin to a settlement of the dispute, but prospective waivers of statutory rights tend to encourage violations of the law by notifying the wrongdoer in advance that he or she can act with impunity; therefore prospective waivers uniquely can violate public policy." *Cange v. Stotler & Co.*, 826 F.2d 581, 594 n.11 (7th Cir. 1987).

Thus, the Second Circuit has held that "a firm cannot buy from a worker an exemption from the substantive protections of the anti-discrimination laws because workers do not have such an exemption to sell, and any contractual term that purports to confer such an exemption is invalid." *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 117 (2d Cir. 2000); *accord, e.g., McCaskill v. SCI Management Corp.*, 298 F.3d 677, 684-86 (7th Cir. 2002) (employee cannot prospectively waive right to attorney's fees under Title VII) (concurring opinion); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (employees cannot waive substantive protections of Title VII by agreeing to arbitration clauses); *Kendall v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993) (employees may not waive Title VII rights that have not yet accrued).

Similarly, the Eleventh Circuit has held that borrowers may not prospectively waive their substantive rights under the Truth in Lending Act, *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178 (11th Cir. 1982).[5] Likewise, the Fifth

[5] *Parker* also highlights out that a prospective waiver of remedies for future statutory violations will generally not be a "knowing" waiver, as

(*Footnote continued*)

Circuit, in a case later cited with approval by this Court, has stated that enforcement of an agreement prospectively waiving remedies against future antitrust violations would be "clearly against public policy." *Redel's Inc. v. General Electric Co.*, 498 F.2d 95, 99 (5th Cir. 1974) (cited in *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 637).

### B. This Court's Decisions Do Not Allow Arbitration Agreements to Waive Substantive Rights and Remedies.

A predispute arbitration agreement necessarily involves a prospective waiver of some rights—specifically, certain of the procedural rights, such as the right to trial by jury, that accompany litigation of a claim in a judicial forum. But that prospective procedural waiver is effective (at least in cases that arise out of transactions involving commerce) only because Congress has specifically so provided in the Federal Arbitration Act, 9 U.S.C. § 2, which makes such contracts enforceable. The enforceability of prospective agreements to arbitrate, however, in no way implies the enforceability of prospective limits on the substantive rights and remedies that can be vindicated through arbitration. Indeed, as this Court has repeatedly stated, the enforcement of an agreement to arbitrate a particular claim is acceptable only because and to the extent that the parties' substantive rights can be fully vindicated in arbitration.

Thus, while holding that antitrust claims are subject to arbitration, the Court expressly stated that if the arbitration agreement "operated … as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy." *Mitsubishi*, 473 U.S. at 637 n.19. The

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the person making the waiver may be unaware not only of the nature of her statutory rights, but also of the future conduct that may infringe them. *See* 673 F.2d at 1182.



Court repeated the point in exactly the same words in *Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995), in holding that claims under the Carriage of Goods by Sea Act were arbitrable. And in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), while holding claims under the Age Discrimination in Employment Act were subject to arbitration, the Court emphasized that the agreement to arbitrate did not involve the waiver of any substantive rights under the Act and that the rules of the arbitration did not limit the arbitrators' power to grant the full range of equitable and legal remedies to which the claimant might be entitled. *Id.* at 26, 30. Similarly, in *McMahon*, the Court held securities and RICO claims arbitrable because arbitration of such claims does "not entail any consequential restriction on substantive rights," 482 U.S. at 232, and plaintiffs can "effectively vindicate" both securities claims and RICO treble damages claims in arbitration. *Id.* at 242.

The Court summarized the teachings of these cases just last Term in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). There, while holding that an individual employee's agreement to arbitrate disputes could not bar the EEOC from exercising its statutory power to file a lawsuit based on the employee's grievances, the Court explained the rationale of—and limits on—its prior holdings that statutory claims may be subject to arbitration. The Court's language leaves no doubt that prospective waivers of substantive statutory rights are not enforceable merely because they are contained in arbitration agreements:

> We have held that federal statutory claims may be the subject of arbitration agreements that are enforceable pursuant to the FAA because the agreement only determines the choice of forum. "In these cases we recognized that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'"

*Id.* at 296 n.10 (quoting *Mitsubishi*, 473 U.S. at 628, and *Gilmer*, 500 U.S. at 26). The Court emphasized that an arbitration clause is "effectively a forum selection clause" rather than a waiver of statutory remedies, and it emphasized that any attempt to find a substantive waiver in an arbitration agreement "obscure[s] this crucial distinction and [runs] afoul of our precedent." *Id.* at 295, 296 n.10.

### C. The Nation's Leading Arbitration Organizations Increasingly Reject Efforts to Limit Substantive Rights and Remedies in Arbitration.

Petitioners and the amici who support them suggest that arbitration will somehow be crippled if enforcement of arbitration agreements that waive substantive statutory rights and remedies is denied. As explained above, that submission conflicts with the public policy against enforcement of such waivers and the limits this Court has placed on the acceptability of arbitration agreements in such cases as *Waffle House* and *Mitsubishi*. In addition, petitioners' contention runs counter to the growing recognition by leading organizations that actually administer arbitration agreements that the enforcement of such waivers of substantive rights is unfair and inappropriate.

The American Arbitration Association, for example, recently amended its rules to provide expressly that the remedies an arbitrator may grant in consumer arbitration cannot be limited: The Association's Rule C-7(c) states that an "arbitrator may grant any remedy, relief or outcome that the parties could have received in court." American Arbitration Association, Supplementary Procedures for Consumer-Related Disputes, Effective March 1, 2002 (available at www.adr.org). Similarly, JAMS, another leading arbitration organization, has adopted a "Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses," which provides, in relevant part:



> Minimum Standards Of Procedural Fairness
>
> JAMS will administer arbitrations pursuant to predispute arbitration clauses between companies and individual consumers only if the contract arbitration clause and specified applicable rules comply with the following minimum standards of fairness.
>
> * * *
>
> Remedies that would otherwise be available to the consumer under applicable federal, state or local laws must remain available under the arbitration clause, unless the consumer retains the right to pursue the unavailable remedies in court.[6]

The New York Stock Exchange and the National Association of Securities Dealers, both of which offer securities arbitration under rules approved by the SEC, also foreclose limits on remedies by providing that their members may not use predispute arbitration agreements with customers that "include any condition which … limits the ability of a party to file any claim in arbitration or limits the ability of the arbitrators to make any award."[7] As a result, securities arbitrations conducted by the NASD and NYSE regularly include claims for punitive damages, statutory treble damages, and similar remedies. The NASD has also adopted special rules for the arbitration of employment discrimination disputes, which provide that in arbitration of such claims, "[t]he arbitrator(s) shall be empowered to award any relief that would be available in court under the law," including attorney's fees "as part of the remedy in accordance with applicable law."

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[6] The JAMS policy is available on its website, www.jamsadr.com.

[7] Constitution of the New York Stock Exchange, Inc., Article IX, Rule 636(d) (available at www.nyse.com/arbitration); NASD Rule 3110(f) (available at www.nasd.org).

NASD Code of Arbitration Procedure, Rules 10214, 10215 (available at www.nasdadr. com).[8]

Any suggestion that enforcement of agreements purporting to waive substantive rights and remedies is essential to the vindication of the interests arbitration is supposed to serve is flatly contradicted by these standards and rules, which have been put in place by some of the nation's leading sponsors of arbitration. Rather, the policies of these organizations reflect a recognition of the same principle asserted by this Court in *Waffle House* and *Mitsubishi*: that it is unfair and wrong to permit arbitration agreements to be used to give effect to prospective waivers of substantive rights created by law.

## II. IT IS FOR THE COURTS TO DETERMINE THE ENFORCEABILITY OF ARBITRATION AGREEMENTS THAT PURPORT TO WAIVE SUBSTANTIVE RIGHTS.

Petitioners and their supporting amici urge that even if the contractual terms prohibiting arbitrators from granting respondents the remedies provided by statute for a RICO violation are unenforceable, the issue of the validity of that limit on the arbitrators' authority should be decided in the first instance by the arbitrators. That argument runs counter not only to decades of this Court's precedents, but, even more pointedly, to this Court's latest word on the subject, *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002).

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[8] The NASD also recognized the unfairness of limiting the availability of substantive remedies in arbitration when it proposed new rules governing the standards for issuance of punitive damages in NASD arbitrations. The NASD's proposed rules reflect the view that "it is not appropriate or feasible to eliminate the availability of punitive damages in arbitration so long as public customers are required by most member firms to sign predispute arbitration agreements." SEC Release No. 34-39371; File No. SR-NASD-97-47 (Nov. 26, 1997) (available at www.sec.gov/rules/sro/nasd9747.txt).



As the Court noted in *Howsam*, it has long been the rule that "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the '*question of arbitrability*,'" is generally an issue for judicial resolution. 123 S. Ct. at 591 (emphasis by the Court; citation omitted). Analytically, the question of arbitrability has two components: (1) whether the parties have a valid arbitration agreement; and (2) whether that agreement applies to the particular claim at issue. Although both questions are presumptively for the courts to resolve, this Court has held that the parties can under some circumstances agree that the second question is for the arbitrator to decide; and if they have so agreed, a court may compel them to submit to the arbitrator the question whether a particular dispute is subject to arbitration. *See First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938 (1995). Logically, however, the first component is necessarily one for the court, for if the parties have no valid agreement to arbitrate, they cannot lawfully be compelled to do so.[9] Thus, this Court has held that the question whether an arbitration agreement is unenforceable because it was induced by fraud is an antecedent question for a court to resolve. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967). More generally, as the Court put it in *Howsam*, "a gateway dispute about whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." 123 S. Ct. at 592.

That is precisely the type of dispute involved in this case: The question is whether the respondents are bound by the arbitration clauses at issue, or whether they are unenforceable as to the RICO claims because they purport to waive substan-

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[9] *See, e.g. Volt Information Sciences, Inc., v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so ....").

tive rights that are otherwise available under RICO. *Howsam* dictates that such a dispute is for a Court to resolve.

Moreover, *Howsam* makes clear that the expectations of the parties are critical to the determination of whether an issue about whether a dispute is subject to arbitration is one for a court or an arbitrator to determine. As the Court put it, a "question of arbitrability" presents a "gateway question" for a court to resolve "where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Id.*

Here, the parties would not likely have thought that they had agreed to allow the arbitrators to decide whether the contractual limitations on their authority were enforceable. On the contrary, the general expectation of parties to arbitration agreements is that arbitrators will abide by limits on their authority. Indeed, the Federal Arbitration Act expressly provides that one of the few grounds for vacating an arbitration award is that the arbitrators "exceeded their powers" under the parties' arbitration agreement. *See* 9 U.S.C. § 10(a)(4). The arbitration system simply does not contemplate that arbitrators will take it upon themselves to determine the validity of the arbitration agreements from which they derive their powers.

Moreover, the enforceability of a purported waiver of statutory rights and remedies is a purely legal question that arbitrators are in no way "comparatively better able" to resolve than a court. *Howsam*, 123 S. Ct. at 593. Indeed, it is an issue that only a court (and in particular, this Court) can definitively resolve, and nothing is to be gained by seeking the opinion of a panel of arbitrators on the question. Nor is there any point to permitting an arbitration to proceed under a possibly invalid agreement when the Court can avoid such a



waste of resources by deciding the enforceability issue at the outset. Thus, in this case, *Howsam*'s holding that "a fair and expeditious resolution of the underlying controversy" can best be achieved by assigning issues to the "decisionmaker with ... comparative expertise" points definitively to judicial resolution of the enforceability issue. *Id.*

Moreover, the petitioners' suggestion that the arbitrators' resolution of the enforceability issue can be adequately reviewed by the courts in the context of a post-arbitration challenge to their award only underscores that the matter is one for the courts, for at least two reasons. First, reliance on post-arbitration review is problematic because of the very narrow scope of judicial review of the merits of arbitrators' decisions. See 9 U.S.C. § 10. Second, arbitrators are not required to provide opinions explaining their decisions. Thus, if the arbitrators were to deny an award of treble damages, a reviewing court could well have no way of knowing whether the reason was that the arbitrators had concluded that the contractual prohibition on such remedies was enforceable, or that the arbitrators had decided the award was not warranted for some other, valid reason.

Finally, judicial resolution of the issue of enforceability before the case is referred to arbitration is consistent with the approach taken by this Court in *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000). There, the Court considered whether an arbitration agreement was unenforceable on the ground that it imposed unreasonable costs on a plaintiff seeking to assert a claim under a federal statute. Although the Court held that the plaintiff in that case had not succeeded in showing that arbitration under the agreement would be prohibitively expensive, the Court acknowledged that an agreement that precluded a litigant from "effectively vindicating her federal statutory rights in the arbitral forum" would be unenforceable. *Id.* at 90. More importantly for purposes of this case, the Court's consideration of the claim of unenforceability on its merits, before sending the case to ar-

bitration, confirms the common-sense proposition that determining whether an arbitration agreement is enforceable is necessarily antecedent to enforcing it. Petitioners' position does violence to that principle and should be rejected.[10]

## CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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[10] As a final fallback argument, petitioners suggest that even if the damages limitation is unenforceable, it should be "severed" and the remainder of the arbitration clause enforced. The Petition for Certiorari, however, did not say that petitioners would ask this Court to decide a severability issue. Even if the issue were properly before the Court, and even if it were assumed that a fundamental limitation on the powers of the arbitrators could ever be severed from the arbitration agreement, the question of the circumstances under which severance would be appropriate would presumably be a matter of contract law. Petitioners' assertion that the FAA requires a presumption of severability regardless of what otherwise applicable contract law principles would provide runs counter to this Court's recognition that the purpose of the FAA "was to make arbitration agreements as enforceable as other contracts, but not more so." *EEOC v. Waffle House*, 534 U.S. at 294 (quoting *Prima Paint*, 388 U.S. at 404 n.12). Even on their own theory of severability, petitioners provide an insufficient analysis of relevant contract-law (and, for that matter, choice-of-law) principles to establish the appropriateness of severance.